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REPORT OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

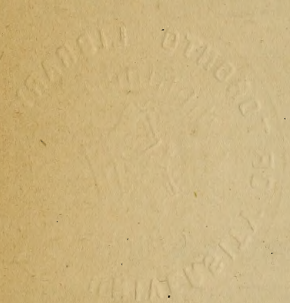
CHRISTOPHER ROBINSON, Q. C.,
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. XXVI.

CONTAINING THE CASES DETERMINED
FROM TRINITY TERM, 30 VICTORIA, TO EASTER TERM, 30 VICTORIA :
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND DIGEST OF THE PRINCIPAL MATTERS.

TORONTO :
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JUDGES
OF THE
COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

THE HONORABLE WILLIAM HENRY DRAPER, C.B., *Chief Justice.*

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

Attorneys-General :

THE HONORABLE SIR JOHN ALEXANDER MACDONALD, K.C.B.

“ “ JOHN SANDFIELD MACDONALD.

Solicitor-General :

THE HONORABLE JAMES COCKBURN.

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“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

CLIFTON V. RYAN AND WHITT.

Will—Construction—Annuities.

One W. devised his farm to his wife, to hold so long as she remained his widow, provided that she pay to his mother \$20 a year during her life, and to his brother William the same; and in the event of the marriage or death of his wife, he willed that the property should be sold, and the proceeds divided between the children of his brothers and sister.

Held, that the will created no charge upon the land, and that the annuitants had no power to distrain.

REPLEVIN for goods, &c., taken on lot 32, in the ninth concession of Hullett, being the plaintiff's close.

Avowry by the defendant Whitt:—that S. W., since deceased, being seized in fee simple of lot No. 32, in the ninth concession of Hullett, by his last will, dated the 13th of August, 1861, gave to one William Westacott an annuity or rent charge of \$20 a year, payable yearly, arising out of said lot, commencing from the 1st of Jan-

uary, 1862, to continue during the natural life of the said William Westacott, and the said S. W., by his said will, gave to one Elizabeth Westacott an annuity or rent charge of \$20 a year, payable yearly, arising out of the said lot, commencing on the 1st of January, 1862, to continue during her natural life; and the will contained power to the said William and Elizabeth to distrain for the arrears of the said rent charges; and because \$40 of the first rent charge was due and in arrear to the said William, he, by a power of attorney under his hand and seal, dated the 12th of August, 1865, authorized and commanded the defendant Whitt, as his attorney, to enter upon the said lot and distrain for the said arrears. [Similar statement as to \$60, three years' arrears of the annuity to Elizabeth, and of power from her.] And the plaintiff occupied the premises in which, &c., being the said lot, as tenant or otherwise; and the said instalments being due and in arrear as aforesaid, Whitt, as attorney for the said William and Elizabeth, respectively avows the taking, &c., as, for, and in the name of a distress for the said arrears.

2. Defendant Ryan acknowledges the taking, as bailiff, under a warrant of distress from the defendant Whitt, acting as attorney for William Westacott and Elizabeth Westacott, as set forth in the preceding avowry.

The plaintiff joined issue on the pleas of the defendants.

The case came on for trial in March, 1869, at Goderich, before *Morrison, J.*

The parties agreed to and admitted the following facts: that Stephen Westacott died before the 1st of January, 1862, without issue, leaving his widow surviving, having on the 13th of August 1861 made his will, by which he directed that his funeral charges and just debts should be paid by his executors. And as to the residue of his estate and property not required for the payment of his debts, funeral charges, and testamentary expenses, he gave and devised to his wife all his household furniture, and all his present stock and farm produce and implements, also his farm, being lot 32, in the ninth concession of Hullett, to hold so long as

she remained his widow, provided that she pay to testator's mother \$20 in cash, annually, commencing from the 1st of January then next, and to continue during her natural life, and also that she pay to his brother William \$20 annually, commencing from the 1st of January then next, and to continue during his natural life, and that she shall pay to his brother George \$5, before the 1st of January then next. And in the event of the marriage or death of his wife, the testator willed that all the property be sold, and the proceeds put to interest, and to be divided equally between the children of his brothers George and William and his sister Mary Ann, each to receive his or her share as soon as he or she comes of age; and he appointed two executors.

The widow refused to pay the two annuities, and thereupon the defendants distrained under a warrant. The widow had married a second husband.

The questions submitted were: Had the brother and sister named in the will as annuitants power to distrain for the amounts therein mentioned, upon the foregoing facts.

2. Can the defendants avail themselves of the right of the parties named in the will to distrain on non-payment of the amounts therein mentioned (if such a right exists) under the pleas pleaded.

A verdict was rendered for the plaintiff, and in Easter term, *Spencer* obtained a rule to shew cause why the verdict should not be entered for the defendant.

In this term, *S. Richards*, Q. C., shewed cause, citing *Jarm. on Wills*, 3rd ed., vol. II., p. 283.

Spencer, contra, cited *Wright v. Wilkin*, 9 W. R. 161; *Crabbe R. P.* §266; *Sugden on Powers*, 7th ed., vol. 1., p. 122; 4 Geo. II., ch. 28, sec. 5; *Buttery v. Robinson*, 3 Bing. 392.

DRAPER, C. J.—There should not have been a rule *nisi* in this case. It should have been set down upon the paper, and paper books delivered, containing the pleadings and admitted facts.

As, however, we have considered it, we may as well express our conclusion.

We think the words of the will do not create a charge upon the land, and that, as no express power to distrain is given, no such power exists.

There is an apparent inconsistency in the gift to the widow during her life or widowhood, (and the latter status has it seems already come to an end), provided she pays an annual sum to each of two parties during their respective natural lives. It is not stated directly that the widow entered and took the land subject to the charges, though it was said during the argument that the plaintiff was her tenant. But assuming that she had done any act which imposed on her the burden of paying these sums annually, that would give no right to distrain for them.

The testator seems to have forgotten, when he directed that his property should be sold upon either the marriage or death of his widow, that he had made no provision for the payment of the two annuities, except by the devise to his widow, provided she paid severally to his mother and his brother \$20 per annum. But we cannot treat this omission as constituting a charge on the land.

We think the rule must be discharged, as we think that there was no legal authority to distrain, whatever other remedy there may be for the annuities.

HAGARTY, J.—The children of his brother William are to get the benefit of a share of the property when sold on the marriage of the widow; the mother's interest is apparently overlooked. The absence of any words charging the legacies or annuities on the land, and the presence of the direct provision for a disposition of the estate on the marriage of the widow, distinguish this case from *Wright v. Wilkin* (9 W. R. 161), cited by Mr. Spencer.

Even if there were no limitation over, the doctrine laid down in that case would hardly avail the defendants. *Crompton, J.*, says, "What under the old law was a devise upon condition is now a devise subject to trusts, except where there is a limitation over," and the like position is in *Sugden on Powers*, vol. 1, page 122, 7th ed.

The defendants might be entitled to equitable relief in

such a case, but I still do not see how the 4th Geo. II., ch. 28, sec. 5, will convert their claim into a rent seck, for which the remedy by distress is thereby created.

Rule discharged.

THE QUEEN V. PATRICK BRADY.

False pretences—Consol. Stat. C., ch. 92. sec. 71.

An indictment for obtaining from A. \$1200 by false pretences, is not supported by proof of obtaining A's promissory note for that sum, which A. afterwards paid before maturity.

The term "valuable security," used in Consol. Stat. C. ch. 92, sec. 72, means a valuable security to the person who parts with it on the false pretence; and the inducing a person to execute a mortgage on his property is therefore not obtaining from him a valuable security within the act.

THE indictment against the defendant contained three counts. 1. For that he unlawfully, fraudulently, and knowingly, by false pretences did obtain from one Finlay McGregor \$1200, the money of the said Finlay McGregor, with intent to defraud.

2. That he unlawfully, fraudulently and knowingly, by false pretences, did obtain from the said Finlay McGregor a certain valuable security, to wit, a certain mortgage on real estate securing the payment of \$2,400, and made by the said F. McG. and his wife to the said defendant, the property of the said F. McG., with intent to defraud.

3. That he unlawfully did obtain from the said F. McG. a certain sum of money, to wit, to the amount of \$1200, the property of the said F. McG., with intent to defraud.

The trial took place at Sandwich, in April, 1866, before *Morrison, J.*, when it appeared, in substance, that the prisoner having agreed to lend \$5000 to the prosecutor, Finlay McGregor, gave him certain drafts purporting to be drawn by the Clyde Exchange Bank of Ohio on the Fourth National Bank of New York, and received from McGregor as part of the security a mortgage on his farm for \$2400, and a note for \$1200, which note he paid within four or five days, and before it became due. The prisoner represented that these drafts were good, and would be paid, and that the

money was in New York, but it turned out that the Clyde Bank was a swindle and the bills worthless.

It was objected that there was no evidence of getting money from McGregor to support the first count; and as to the second, that the mortgage was not a valuable security within the statute; that what the prisoner did obtain was only a signature to a note or mortgage; that both these objections applied to the third count, and that Consol. Stat. ch. 92, sec. 73, applies to property only, not moneys.

The learned judge directed a verdict for the defendant on the third count, and as to the other counts, he left it to the jury to say on the evidence whether the prisoner did impose upon McGregor when the latter received the drafts, by the false statements that they were genuine, and upon the faith of such false representations induced McGregor to give the \$1200 and the mortgage.

The jury found the prisoner guilty.

Albert Prince, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, on the same grounds as those taken at the trial. He cited *Regina v. Kay*, 1 D. & B. 232; *Rex v. Wavell*, 1 Moo. C. C. 224; *Regina v. Crosby*, 1 Cox C. C. 10; *Regina v. Bryan*, 2 F. & F. 567; *Rex v. Yates*, 1 Moo. C. C. 170; *Rex v. Douglass*, 1 Camp. 212; *Noble v. Adams*, 7 Taunt. 59.

Robert A. Harrison, for the Crown, shewed cause, and cited *Regina v. Huppel*, 21 U. C. R. 281; *Regina v. Lee*, 23 U. C. R. 340; *Regina v. Davis*, 18 U. C. R. 180; *Regina v. Evans*, 8 Cox C. C. 257, 5 Jur. N. S. 1361; *Regina v. Jessop*, 1 D. & B. 442, 4 Jur. N. S. 123; *Regina v. Danger*, 1 D. & B. 307, 3 Jur. N. S. 1011; *Regina v. Gardner*, 1 D. & B. 40, 2 Jur. N. S. 598.

DRAPER, C. J., delivered the judgment of the court.

As to the false pretence, it was, we think, sufficiently proved to be that certain drafts, in return for which the prisoner obtained from the prosecutor, Finlay McGregor, a mortgage and a promissory note, were good and would be

paid, whereas it appeared that these drafts were worthless from first to last, and were merely fictitious.

The question then on the first count is, whether the prisoner obtained \$1200 from the prosecutor on this pretence, and we are of opinion that the evidence did not sustain the allegation. The prosecutor, according to his own statement, gave a promissory note for this amount at the time he got the drafts—an engagement or promise to pay money at a future date. It is true he afterwards paid the money, but though remotely that payment arose from the false pretence, yet immediately and directly it was made because the prosecutor desired to retire his note, and did so before it became due. We do not think this establishes an obtaining of money by the defendant by the false pretences, which, though it may be said they were continuing, were not, according to the evidence, made or renewed when the money was paid. Suppose the note was drawn at ninety days, and not paid till it matured, it could not be deemed that the money was obtained by the false pretence, though but for such pretence it would not have been given; and it makes no difference that we can see that it was paid before it fell due.

Upon the second count the case of *The Queen v. Danger* (3 Jur. N. S. 1011), seems to us adverse to the conviction. Can it be said that the mortgage was a valuable security in the hands of the prosecutor, and so his property? Until signed, sealed and delivered by him to the prisoner, it was no security at all, and it does not even appear that the paper on which it was drawn belonged to the prosecutor. We think the term “valuable security,” as used in the statute, means a valuable security to the person who parts with it on the false pretence.

We think the rule should be made absolute.

Rule absolute.

ADAM HENRY MEYERS AND PATRICK WALSH, PLAINTIFFS,
 V. SANDFORD BAKER, DEFENDANT; AND IN THE MATTER
 OF A CERTAIN CAUSE IN THE COUNTY COURT OF THE
 COUNTY OF HASTINGS, WHEREIN GEORGE H. HARGREAVES
 IS PLAINTIFF, AND ADAM HENRY MEYERS AND PATRICK
 WALSH ARE DEFENDANTS.

Replevin—Certiorari—Mandamus.

A. brought replevin in the county court and obtained a verdict, which was set aside because title to land came in question. Nothing was said in the rule about a new trial, but he served another notice of trial, and the cause was made a *remanet*. The surety being sued in this court on the replevin bond for not prosecuting the suit with effect, moved for a *mandamus* to compel the county court to proceed with the action, or a *certiorari* to remove it, and in the meantime to stay proceedings in this court; but the court refused to interfere.

Semble, that a *certiorari* imports jurisdiction in the inferior court, and will not lie to determine whether it exists, at least not at the instance of the plaintiff who sued there.

28 Vic., ch. 44, prohibits a *certiorari* unless the debt or damages claimed exceed \$100. *Quære*, therefore, whether replevin is within the act.

The *mandamus* was refused, among other reasons, because the applicant had a remedy by appeal from the rule in the county court setting aside the verdict.

IN Easter term *J.A. Boyd*, for defendant Baker and plaintiff Hargreaves in the county court suit, obtained a rule calling upon the plaintiffs, and the defendants in the said county court suit, and the judge of the said county court, to shew cause why a writ of *mandamus* should not issue, commanding the said judge to proceed with the adjudication of the said county court suit, and to cause the same to be determined as of the proper jurisdiction of that court; or why a writ of *certiorari* should not issue to remove the cause from the said county court to this court, under the provisions of the statute of 1860 relating thereto, and why until the determination of the replevin suit mentioned in the affidavits filed in this court upon *certiorari* or in the court below, all proceedings in the first named suit against Baker, the surety in the replevin bond, should not be stayed.

The action in this court, *Meyers et al. v. Baker*, was founded on a replevin bond, dated the 7th of February, 1865, given to the sheriff of the County of Hastings, in the penal sum of \$450, subject to a condition, that if one George H. Hargreaves should prosecute his suit with effect and without

delay against Meyers and Walsh, for the taking and detaining unjustly his cattle, goods and chattels, to wit, &c., and should make a return thereof, if a return should be adjudged, and pay such damages, &c., if the said Hargreaves should fail to recover in his replevin suit, the bond should be void. This bond was assigned by the sheriff to the plaintiffs, and the suit thereon was begun on the 10th of April, 1866. The breach assigned was that Hargreaves did sue out his writ of replevin, but did not prosecute his suit with effect and without delay.

It appeared the replevin suit was brought to trial in September, 1865, (in which Hargreaves was plaintiff and the plaintiffs in this cause were defendants), and that the plaintiff got a verdict on one issue and the defendants on two others. In the following county court term the defendants obtained a rule *nisi* to set aside the verdict, because the title to land came into question. This rule also asked for a new trial. In January, 1866, the rule was made absolute to set aside the verdict, saying nothing about a new trial, and, as the defendant Meyers swore, it was on the ground of want of jurisdiction. In this same January term a rule *nisi* was issued staying any proceedings upon the bond now sued upon, and prohibiting steps from being taken to enforce it, which rule had been enlarged with a stay of proceedings. This action had however been brought by the plaintiffs as assignees of the sheriff. The enlargement of the rule was, as was sworn, made in opposition to the protest of the present plaintiffs' counsel. So far as was shewn, it was still pending, and the plaintiff Meyers swore, that thinking the delay disingenuous, and that if the county judge had no jurisdiction over the suit he could have none over the bond, he brought this action.

It was sworn that at the trial of the replevin suit it was proved, under a plea of *non tenuit*, that before the rent accrued which was distrained for by Meyers, Hargreaves was evicted from a large portion of the demised premises under a *hab. fac. pos.*, founded on a judgment in ejectment recovered against Meyers. To prove that eviction an exem-

plification of this judgment was put in, and the sheriff was called to prove the forcible execution of the writ of *hab. fac.*, and the loss of possession by Hargreaves of so much of the premises demised. And it was submitted that the exemplification was not produced to dispute Meyers' title to the land, but only as a foundation to prove the eviction, since all that Hargreaves desired to show was that Meyers had, in a suit against him, and which he defended solely, allowed Hargreaves to be turned out of possession.

After the rule setting aside the verdict in the county court had been granted, another notice of trial was served, and at the following sittings, as the defendant's attorney (also Hargreaves' attorney) swore, the cause was made a *remanet* by consent. The defendant Meyers, however, swore that Mr. Wallbridge was retained as counsel for the defence; that he (Meyers) had a communication with the opposite attorney, who told him it would not be necessary to keep witnesses for the trial, as the judge would read over the evidence given at the first trial, and direct the jury according to his opinion, which was understood to be that he had no jurisdiction. Hargreaves' attorney swore the cause was then made a *remanet* by consent of parties. Meyers swore he did not consent, and that he did not request Mr. Jellett to act for him as counsel at that trial, and that the clerk of the county court told him he could not say who consented on the part of the defendants. Mr. Jellett was the counsel who moved for the defendants the rule *nisi* and the rule absolute to set aside the verdict, but it was not sworn that he appeared and consented to make the cause a *remanet*.

Boyd, during this term, supported the rule, citing *Powley v. Whitehead*, 16 U. C. R. 592; *Cormack v. Bergen*, 5 O. S. 561; *Elsworth v. Brice*, 18 U. C. R. 442; *In re The Judge of the County Court of Elgin*, 20 U. C. R. 592; *Patterson v. Smith*, 14 C. P. 525; *Tummons v. Ogle*, 6 E. & B. 571; *Ex parte The Great Western R. W. Co.*, 2 H. & N. 557; *Longbottom v. Longbottom*, 8 Ex. 203;

The Queen v. Raines, 1 E. & B. 855; Upton v. Greenlees, 17 C. B. 64.

C. S. Patterson showed cause during this term, and cited *Gent v. Cutts*, 11 Q. B. 288; *Hopcraft v. Keys*, 9 Bing. 613; 23 Vic. ch. 45.

DRAPER, C. J., delivered the judgment of the court.

There are two distinct applications embraced in this rule; one for a *mandamus* to the judge of the county court to proceed in the replevin suit, the other for a *certiorari* to remove the proceedings in that suit into this court; and one or other, or both, are made the ground of the only application made in this case of *Meyers and Walsh v. Baker*.

We granted the rule *nisi* with some hesitation, even though the facts and explanations brought out on shewing cause were not before us.

Apart from the application for a *mandamus* or a *certiorari*, we see no ground for staying the proceedings in this cause. We are not even satisfied that if either of those writs were granted the cause should be stayed. For the bond may have been forfeited by the delay of *Hargreaves*, a cause of forfeiture which would not be touched by any result which might attend the granting either of those writs. If the proceedings on this bond were permanently stayed, *Hargreaves* would have little inducement to press on with his replevin suit; he has got the things seized back into his possession.

As to the *mandamus*.—It was objected, on behalf of the plaintiffs, that no application to the judge to proceed and no refusal on his part has been shewn; and the objection appears well founded on the facts. The judge took a verdict after the objection of want of jurisdiction was raised. He afterwards set aside that verdict, not however granting a new trial. Assuming that he did so decide on the ground that the title to land was brought in question, if his decision was wrong the plaintiff (*Hargreaves*,) should have appealed. This specific legal remedy is given by statute, and the existence

of that remedy is a good answer to the present application for a *mandamus*, and was in the argument urged as a ground for vacating or treating as void the rule which set aside the verdict. In effect the *mandamus* to proceed in the cause is sought as a substitute for an appeal against the decision on the rule, and apparently after the time for appealing has been allowed to slip by. Moreover, since that rule Hargreaves has acted under it; he has (regularly or no) given a new notice of trial; he has, with the consent of the opposite party, as he represents, made the cause a *remanet*, since when nothing appears to have been done in the county court in the replevin suit. We are clearly of opinion there is no case for a *mandamus*.

Then as to the *certiorari*.—The plaintiff in the court below appears to us to be in this dilemma. The county court had jurisdiction, or it had not. If it had, then no sufficient reason is offered and sustained for removing the cause, no reason why it could not be as properly tried there as in the superior courts. The assumption that there is jurisdiction removes the difficulty as to the title being brought in question, and it is not decided, that I am aware, that a writ of *certiorari* will lie to try whether the inferior court has jurisdiction, at least not at the instance of the plaintiff who brought his suit there, and it is for the applicant for the writ to establish the propriety of granting the writ. Under the 23 Vic., ch. 45, a cause is only to be so removed from the county court when the debt or damages exceed \$100, and then only on affidavit and by leave. A difficulty might arise, which has not been noticed—how far replevin, in which there is no debt, and the plaintiff's damages if he succeeds are almost nominal, comes within this act.

But if the county court has not jurisdiction, then the plaintiff in truth wants a *certiorari*, not because the cause is one which can be *more properly tried* in the superior court, but because he has brought his action in a court where it cannot be tried at all. It appears to us a *certiorari* imports authority in the inferior court to entertain and dispose of

the case, but removes it because it is fitter it should be adjudicated upon by the higher tribunal. Now here the plaintiff is evidently apprehensive the judge will decide that he has no jurisdiction. In fact it is represented that he did so decide when he set the verdict aside. It may be conceded it was not very logical to do so on the ground that it had appeared the proceeding was *coram non judice*, but if that be so in fact; there is no cause in the inferior court to remove.

Upon the whole, we are of opinion the rule must be discharged, and we feel it right to give the plaintiffs their costs. They could not properly, as we now think, be called upon in this action to answer the claim for either a *certiorari* or *mandamus*, both relating to another suit in another court, though they were parties to that suit. The only matter affecting this action was the application to stay proceedings, for which no sufficient case has been made out.

Rule discharged.

RILEY V. THE NIAGARA DISTRICT BANK.

Executions—New sheriff—Sale under Ven. Ex. to his predecessor.

On the 16th of December, 1858, the defendant issued a *fi. fa.* to the then sheriff of Lincoln, K., to which he returned goods on hand for want of buyers, having taken a bond from the execution debtor to produce them, and on the 26th of April, 1860, a *Ven. Ex.* was delivered to him. On the 28th April, 1862, a new sheriff was appointed, who took possession of all the writs found in K.'s hands, but K. made no transfer to him by indenture of the writs or bond, nor did he deliver over to him the goods. In December, 1865, the new sheriff sold under the *Ven. Ex.*, having previously received an attachment at the plaintiff's suit.

Held, that the sale could not be upheld, and that the attachment therefore must prevail.

INTERPLEADER, to try whether goods sold by the sheriff of the county of Lincoln under a writ of *venditioni exponas*, tested 25th of April, 1860, issued out of the Queen's Bench on a judgment recovered by the defendants against Gilbert Samson, Nowron Samson, Alpheus J. St. John, and Joseph Robinson, or the proceeds of those goods, or some part of the goods or proceeds, were at the time of the delivery of

the writ of attachment to the said sheriff in favor of the said plaintiff against the said Nowron Samson as an absconding or concealed debtor, subject to the said attachment or liable to be attached thereunder.

The case was tried at the spring assizes for the county of Lincoln, before *Adam Wilson, J.*

It was proved that on the 16th of December, 1858, the defendants issued a *fi. fa.* to the then sheriff of Lincoln, on a judgment recovered in this court against the four persons named in the interpleader, and the sheriff returned that writ goods on hand for want of buyers. On the 26th of April, 1860, a writ of *ven. ex.* was delivered to him. There was also a judgment in the Common Pleas in favor of the defendants against the two Samsons and defendant Robinson, and a *fi. fa.* and afterwards a *ven. ex.* issued, just as in the suit in this court. On the 28th of December, 1858, a bond was executed by the two Samsons and Robinson to the then sheriff, conditioned that if certain goods mentioned in an annexed schedule, and which had been levied on by the sheriff on these writs, which goods were described as part belonging to Gilbert and part to Nowron Samson, should be forthcoming when required by the sheriff, and that if, before any sale, any other executions should come into the sheriff's hands against the obligors, the said goods "shall be liable" (apparently the word "not" was omitted) for the executions so coming in unless the prior executions shall have been settled.

On the 28th of April, 1862, a new sheriff was appointed (Woodruff), and he took possession of all the writs he found in his predecessor's (Kingsmill's) office. Kingsmill made no transfer to him by indenture of the writs or the bond, nor did he deliver over to him any goods of Samson & Co.

In May, 1862, the attorney of one Gould, who had recovered judgment against Samson & Co., sent to the new sheriff an execution in Gould's favor, on which the sheriff levied, and he returned this writ as settled on the 24th of December, 1863. Sheriff Woodruff stated that he levied also as he supposed under the defendants' writs of *ven. ex.*,

and put an officer in possession of the goods, but did not sell. Gould's attorney directed the sheriff to take instructions from Mr. Benson, who was then the vice-president of the plaintiffs' bank, and he directed the sheriff to withdraw the officer and not to sell. The sheriff understood these instructions to extend to the writs of *ven. ex.* as well as Gould's writ. Nothing was after this done on those writs in 1862-3 and 4. Benson told the sheriff the defendants did not desire to close them up, but would keep them just as they were. Gilbert Samson died in February, 1862. On the 26th or 27th of November, 1865, Mr. Benson telegraphed to the sheriff to go on and sell; that Nowron Samson had left. The sheriff put a person in possession and advertised under the writs of *ven. ex.* a sale to take place on the 11th of December.

On the 8th of December an attachment at the suit of one Price against the goods of Nowron Samson was received by the sheriff, and another on the following day at the plaintiff's suit, and a third at the suit of one Rogers on the 8th of February, 1866. On the 11th of December the sheriff sold according to his advertisement, and one George Emmett purchased for \$1,600. The sheriff was told before the sale that Price's and the plaintiff's attachments were entitled to priority. He sold upon an understanding with Benson. Not an article included in the schedule annexed to the bond of the 28th of December, 1858, was sold. Gould's writ was in the sheriff's office when Woodruff took possession; it was still current and he levied under it by direction of Gould's attorney, and made out a list of goods seized, which was put in. He understood that as Benson settled this execution, and was vice-president of the defendants' bank, it was they who settled it, and he withdrew the man in possession and gave the goods to Samson & Co. At the sale Benson pointed out to the sheriff what goods to sell as being property in existence at the time of the receipt of the defendants' *fi. fas.* The bank had a mortgage from Robinson, one of the execution debtors, but it was sworn to be only a collateral security.

Mr. Benson was called by the defendants, and swore he was vice-president of the bank when he became president, and still continued in that office: that he bought Gould's judgment for himself and not for the bank, having been informed by Mr. Miller that it was entitled to priority over the bank executions: that he told the sheriff to withdraw on Gould's writ only, and not on the bank writs. He said he bought in order to preserve priority to the bank, and he also wished to prevent Samson being sold out under Gould's writ.

It was also proved on the defence that part of the goods seized under Gould's execution were not in existence in December, 1858, but that the machinery was, and that all the goods which the sheriff sold in 1865 were in existence when the defendants' writs of *fi. fa.* were in force in the (first) sheriff's hands, and might be worth \$2,000 or \$3,000: that in 1855 there were three partners in the firm of Samson & Co., and it was understood Gilbert had half and the other two the residue. Ireland, the third partner, retired in two or three years, and the two Samsons carried on the business until Gilbert's death, till which time it was understood Nowron never had more than one-third interest; afterwards he carried on the concern alone. Some evidence was given that the plaintiff had been made aware of the existence of the defendants' judgment against Samson & Co. when he opened his account with them; the time of that opening was not shewn. A witness swore that he told the plaintiff the bank was not pressing their judgment.

It was agreed the whole case should be left for the court to determine upon the evidence; the court, and if necessary the Court of Appeal, being at liberty to draw all inferences of fact.

For the plaintiff it was contended, 1. That the sheriff Kingsmill having seized goods to the value of defendants' writ and returned the writ accordingly, the execution defendants were thereupon discharged from the writ. 2. That under the *ven. ex.* no goods could be seized, and only those could be sold which had been levied on and remained in the

sheriff's possession under the *fi. fa.* 3. That the goods sold by sheriff Woodruff formed no part of the seizure made under the bank writs on the 28th of December, 1858, by his predecessor. 4. That as the sheriff Kingsmill began the execution he should have completed it, though out of office. 5. That sheriff Woodruff had no authority to sell any goods of Samson & Co., not even those which were seized by his predecessor, much less those which never had been seized at all. 6. That the instructions given by the bank or their vice-president in May, 1862, for the sheriff to withdraw and not to sell, were a withdrawal of Gould's writ and the two writs of *ven. ex.* from execution in the sheriff's hands, and no further instructions were given to the sheriff to proceed while these writs were in force, and not until Nowron Samson had absconded. 7. That the writs of *ven. ex.* in 1864 were, from the evidence of the sheriff of what he was told by Benson, not then in the sheriff's hands for execution, and after that time were there fraudulently.

The learned judge ruled formally for the plaintiff, with leave reserved to defendants to move to enter a nonsuit or verdict upon the whole case, and as to the interest or value of Nowron Samson in the goods as the court might consider he had therein.

In Easter term *J. H. Cameron*, Q. C., obtained a rule to enter a nonsuit or verdict for the defendants, or for a new trial, on the ground that the interest of the attachment debtor in the property was only a moiety, and that the same being a partnership interest was not liable to seizure, or at any rate to seizure for more than a moiety.

In this term *Richard Miller* shewed cause. (*Cameron*, Q. C., stated that he abandoned the first part of his rule and only intended to press the latter part.) He insisted the question as to moiety could not be raised: that the former sheriff having returned to the *ven. ex.* goods on hand to the amount endorsed to be levied, it operated as a satisfaction of the judgment; it was equivalent to a return of money made. He cited 2 Saund. 47 and the notes;

McKee v. Woodruff, 13 C. P. 583 ; Ross v. Grange, 25 U. C. R. 396.

J. H. Cameron, Q. C., contra.

DRAPER, C. J., delivered the judgment of the court.

The goods were seized by sheriff Kingsmill ; the *ven. ex.* was received by him ; and when he went out of office, if he did not sell, he might have been compelled to do so by a writ of *distringas nuper vicecomitem*, though probably not after this long delay. Neither the writ of *ven. ex.* nor the custody of the goods was transferred to Woodruff, and therefore he could not execute it by selling. It gave no authority to seize, for it was founded on the return of Kingsmill that he had seized and held the goods ; a return which, for some purposes at least, bound the defendants. Hence the sale by Woodruff could not be upheld under the *ven. ex.*, and the goods were liable to the plaintiff's attachment, which was in the sheriff's hands before he sold.

Postea to the Plaintiff.

FERGUSON V. CARMAN—THE CORPORATION OF THE COUNTY OF FRONTENAC, GARNISHEES.

Practice—Attachment of debts—Notice to judgment debtors.

An order on garnishees to pay over having been made upon a summons of which the judgment debtor had no notice, it appeared, on application to rescind such order, that the debt had been assigned before the attaching order, and that the garnishees had notice of such assignment before the summons was served on them, to which they did not appear, and before they paid over the money under the order. Under these circumstances the order was rescinded, with costs to be paid by the judgment creditor, who it appeared was also aware of the assignment.

Notice of an application to garnish should always be given to the judgment debtor ; but, *Quære*, whether it can be imposed as a condition on the judgment creditor, the statute not requiring it.

It was alleged, but held not sufficiently proved, that the judgment debtor was insolvent when he made the assignment ; and *Quære*, whether the judgment creditor could set that up.

K. McKenzie, Q. C., obtained a rule *nisi* in Easter term last, calling upon the judgment creditor, the garnishees, and William Ferguson, Esquire, treasurer of the county of Frontenac, to shew cause why the attaching order made by

Draper, C. J., on the 2nd of February, 1866, (attaching all debts due from the garnishees to the judgment debtor, and directing the garnishees to attend on the 5th day after service to shew cause why they should not pay over) and the order to pay over, made by *Hagarty*, J., on the 8th of February, 1866, should not be rescinded, on the ground that there was no debt due from the garnishees to the judgment debtor susceptible of attachment, such debt having been assigned before the making of said orders, to wit, on the 17th of January last, by the judgment debtor to one William Glidders, for valuable consideration, of which the garnishees had notice; or on the ground that the garnishees did not shew cause against the summons, or give notice to the assignee, and that no copy of the attaching order and summons to shew cause was served on the judgment debtor or the assignee, nor had they any notice thereof; or on the ground of collusion between the judgment creditor and said William Ferguson in the obtaining of said orders; and on the ground that neither the judgment debtor nor the assignee had opportunity to shew cause against the making said orders; and why the judgment creditor, the garnishees, and William Ferguson, or either of them, should not pay the costs of this application to the said judgment debtor and the assignee, or either of them, as the court might direct.

During this term *Gwynne*, Q. C., shewed cause, citing *Baynard v. Symmons*, 5 E. & B. 59; *Seymour v. The Corporation of Brecon*, 5 H. & N. 961; *Magrath v. Hardy*, 4 Bing. N. C. 793; *Westoby v. Day*, 2 E. & B. 605; *Wood v. Dunn*, L. R. 1 Q. B. 78; Ch. Arch. Prac. 11th ed. p. 700.

K. McKenzie, Q. C., in support of the rule, cited *Hirsch v. Coates*, 18 C. B. 757; *Clark v. Clark*, 8 U. C. L. J. 107.

The facts of the case are fully stated in the judgment of the Court, delivered by

DRAPER, C. J.—I granted an attaching order in Chambers in this case on the 2nd of February last, with a summons calling upon the garnishees to shew cause why they

should not pay over a debt due by them to the judgment debtor. This summons was not required to be served on the judgment debtor, which had been the course pursued by the different judges in Chambers for a long time past, to prevent difficulties and questions arising from the want of notice to him. Had my attention been called to it at the time I would not have granted the summons without that being inserted. On the return of the summons another judge was in Chambers and no cause being shewn, this order was granted as of course.

It appears upon this rule to set aside both these orders that the debt due by the garnishees to the judgment debtor had been assigned by the latter some time before the summons was applied for. The assignment is sworn to have been made on the 17th of January, 1866, in pursuance of an agreement made some time before. The treasurer of the garnishees, William Ferguson, Esquire, had notice in writing of the assignment on or about the 18th of January, and he, after several applications, refused on the 2nd of February to pay it to the assignee, on which day the attaching order, &c., was granted by me. The *bona fides* of the assignment, and that it was founded on valuable consideration, *i. e.*, an existing debt for work and services, is distinctly sworn to. The assignee in his affidavit, sworn 1st of March last, swears that he has good reason to believe, and does believe, that the garnishee summons and order to pay over were obtained by collusion with the treasurer of the garnishees, who is father of the judgment creditor.

The affidavit of Mr. Price (sworn 1st March last) is very strong as to the treasurer's knowledge of the assignment, and it sets forth a statement by him that he was prepared to pay it, but that he had received a letter from the solicitors of the judgment creditor telling him not to pay the same, and he states his belief that he declined to pay the account for the sole purpose of having the same attached and applied in favor of the judgment creditor, and that the summons and order to pay over were obtained through the collusion of the said treasurer, and that he believes the

money had not yet been paid over by him. Carman's affidavit contains a similar expression of belief.

In reply were produced, 1st, the affidavit of the judgment creditor, sworn 8th of March, in which the garnishee order is stated, and that the money had been paid over to him, not mentioning when, and that he is informed and believes Carman was insolvent when he made the assignment. There is no other matter in his affidavit materially bearing on the question before the court, except that he is a judgment creditor of Carman's. His attorney makes two affidavits now before us. The first is that upon which the attaching order was granted. The other was sworn on the 15th of March. It consists principally of a statement of the answers of the judgment debtor on his *vivâ voce* examination prior to the obtaining the attaching order, and asserts that Carman is insolvent, and was so when judgment was obtained against him in this cause.

The treasurer's affidavit, sworn on the 23rd of March, states that on the 30th of January he received notice from the solicitors of the judgment creditor not to pay over any moneys in the judgment debtor's name, as they were about to take proceedings to garnish them: that he thereupon applied for advice to the solicitors of the corporation, and was told he would not be warranted in paying over moneys to the judgment debtor after such notice: that on the 2nd of February he received another letter from the solicitors of the judgment creditor, stating they had taken "proceedings to garnishee" the debt, and that under the direction of the city solicitors they thought he had a right to withhold the money, and in pursuance of these "legal opinions" he did withhold the payment to Carman or his alleged assignee until it was garnished in his hands, and the order to pay over was served on him, and on the 26th of February he paid the sum, \$87.35, to the judgment creditor by a cheque on the Bank of Upper Canada at Kingston.

The Common Law Procedure Act does not make it necessary that the judgment debtor should be made a party to the summons upon the garnishee to shew cause why he

should not pay the judgment creditor. Our statute in this respect follows the English act, and there is no practice, so far as we can discover, in England such as has been frequently adopted with us, of requiring the judgment debtor to be served with the summons. This is, so far as we are aware, the first occasion on which the matter has been brought under the notice of the court. It is, of course, imposing an additional duty and some expense upon the judgment creditor, and it might sometimes be found difficult to serve him, and he might not always choose to appear or to give notice to his assignee. That the assignee, as a measure of precaution, should give notice of the assignment to the debtor of the assignor, the judgment debtor, is a measure of precaution he should never omit; and if the garnishee having notice of the assignment, takes no notice of the summons to shew cause, and does not choose to ask that no order should be made on him to pay the judgment creditor because of the alleged assignment, he must take whatever consequences may legally attach to such omission. Still, we think the notice of the application to the judgment debtor would be in all cases a prudent step, for the sake of the garnishee; the only doubt is whether we have the right to impose a condition on the judgment creditor which the legislature has not sanctioned.

As to the merits of this case, it is quite clear from the affidavit of the treasurer that he was aware of the assignment in this case before he paid the money, and noticing the apparently studied omission to answer the charge of collusion between him and the attorneys for the judgment creditor, and also some of the dates given, it is fairly to be inferred that he had notice of this assignment before the attaching order and summons were served upon him. If we knew what state of facts he laid before the city solicitors, and the precise terms of their advice or opinion to him (all of which seems to have been a matter of conversation), we could the better judge if he had honestly followed a mistaken view of his position. But it was not a prudent step to act upon any advice or legal opinion from the attor-

neys of the judgment creditor, which to some extent his affidavit apparently asserts he did. We think he paid the money with full notice of the assignee's claim, and deliberately resolved to incur the responsibility.

If so, it only remains to enquire, whether the assignee's claim would, if made known to the judge in Chambers, have prevented the order being made, and whether the garnishees withheld the fact from the judge.

We are of opinion against the garnishees on both points. As to the first, *Hirsch v. Coates* (18 C. B. 757) is a direct authority.—See also *Wood v. Dunn* (Law Rep., Q. B. 78). An analogy might be deduced leading to an opposite conclusion from the case of *Watts v. Porter* (3 E. & B. 743), in which *Erle, J.*, differed from the rest of the court. The opinion of that learned judge is, however, sustained by V. C. Sir *W. P. Wood*, in *Scott v. Lord Hastings* (4 Kay & J. 633), and it is in accord with the opinions expressed in *Kinderley v. Jervis* (22 Beav. 1), and in *Beavan v. Lord Oxford* (6 DeG. McN. & G. 492).

Upon the second point we are equally against them, for the reasons already given. We cannot avoid the conclusion that the object and intention of the judgment creditor, his attorneys and the garnishees, was to defeat the assignment. We presume they thought they had a legal right to do so.

As to the suggestion that the judgment debtor was an insolvent, it is made at a very late period, and if the judgment creditor could set it up at all, as to which it is unnecessary to form an opinion, it is not sustained sufficiently to influence the decision of this application.

We are of opinion the rule to rescind the order for paying over should be made absolute, with costs to be paid by the judgment creditor.

Rule absolute.

IN RE SCOTT AND THE CORPORATION OF THE TOWNSHIP OF HARVEY.

By-law of United Townships—Separation—Application to quash—Practice—Survey.

A by-law was passed by the united townships of Smith and Harvey to levy a certain sum on lands in Harvey, to defray the expense of a re-survey of that township. The union having been dissolved. *Held*, that an application to quash was properly made by a rule calling on the corporation of Harvey, upon a certified copy obtained from the clerk of Smith, the senior township.

The certificate was under the corporate seal of Smith, but there was no seal to the copy of by-law, nor anything but the certificate to shew that it had been sealed. *Held*, sufficient.

The by-law directed the money to be levied "on all lands patented, leased, sold, agreed to be sold, and located as free grants" in the township of Harvey. *Held* bad, following Scott and The Corporation of Peterborough, 25 U. C. R. 453.

IN Hilary term *Robert A. Harrison* obtained a rule to quash a by-law of the corporation of the united townships of Smith and Harvey, entitled "A by-law to assess, levy and collect, £635 5s. 3d., on all lands liable to taxation in the township of Harvey, to defray the expenses incurred in the re-survey of the same," on various grounds, of which it is only necessary to notice the 3rd, 5th and 6th. The third was that a direction to levy on all lands patented, leased, sold, agreed to be sold, and located as free grants within the township of Harvey, and not from the resident landholders, as mentioned in sec. 6, ch. 93, Consol. Stat. U. C., and sec. 58, ch. 77, Consol. Stat. C., or the proprietors, as mentioned in sec. 9 of the first mentioned statute, and sec. 61 of the last mentioned statute, or both, is illegal.

The fifth and sixth objections were: 5. That it is not shewn on the face of the by-law that such a survey as the statute contemplates had been previously made as the statute directs; and, sixth, that the survey referred to in the by-law was not such a survey as the statute contemplates.

The by-law enacted "that the sum of three pence and forty-seven hundredths of a penny shall be assessed, levied and collected on all lands patented, leased, sold, agreed to be sold, and located as free grants, within the said township of Harvey, over and above and in addition to all

other sums levied on said lands, to defray the expenses incurred in the re-survey of the same."

This by-law was proved to have been received from and certified by the township clerk of the township of Smith, being the senior of the two townships, which had formerly been united, and had separated since the passing of the by-law. The affidavits were styled, "In the matter of William Adam Scott and the township of Harvey." The rule called upon the township of Harvey alone; but it had been served upon the clerk of each township. The clerk's certificate attached to the by-law was as follows:

"I hereby certify that the above is a true copy of a by-law passed by the Municipal Council of the united townships of Smith and Harvey, on the 28th day of August, one thousand eight hundred and sixty-four.

CHRISTOPHER BURTON,
Township Clerk."

[Seal of the township.]

There was no other evidence of any seal attached to the by-law.

In this term, *Kerr* shewed cause, objecting to the style of the rule and affidavits; that the by-law was not under the seal of the township of Harvey, but of Smith; that there was no evidence that it was sealed

He cited *Buchart* and the Municipality of Brant and Carrick, 6 C. P. 130; *Fletcher* and the Municipality of Euphrasia, 13 U. C. R. 129; *Fisher v. The Municipality of Vaughan*, 10 U. C. R. 492; *Hodgson and The Municipal Council of York and Peel*, 13 U. C. R. 268; *Gibson and The Corporation of Huron and Bruce*, 20 U. C. R. 121.

Harrison supported his rule, citing *Consol. Stat. U. C. ch. 54, secs. 28, 29, 54, 59, 63*; *Baker v. The Municipal Council of Paris*, 10 U. C. R. 623.

HAGARTY, J., delivered the judgment of the court.

As to the preliminary objections, when the by-law was passed Smith and Harvey were united townships, Smith being the senior. This was on the 28th of August, 1865, the application to quash was made last February. The

applicant's affidavit states that the union was dissolved prior to his application, and he received the copy from the clerk of Smith, as he swears. The copy is certified as being a true copy of a by-law of the council of the united townships, signed by the township clerk, and a seal marked with the words "Municipal Council of Smith," is attached.

No special provision for this particular case is made in the statute. We think the relator could not have taken any other course than he did, obtaining the copy from the clerk of the senior township, there being no other officer to whom he could apply, and no means apparently of getting it certified by the clerk or under the seal of the township of Harvey. Section 195 (providing for the application to quash), need not be so very narrowly construed as Mr. Kerr contends. If he be right, there would be no means of impeaching a by-law of a junior township separated, as Harvey was, after the passing of the by-law.

As to the township of Smith being called on to answer the rule, it may be answered that no direct interest appears in that Township. The county by-law directs that the united council of Smith and Harvey shall levy the required rate from Harvey, and the operation of the by-law of that body accordingly is confined to Harvey.

Section 59 directs that the by-laws of the union shall continue in force in the several townships, until altered or repealed by the respective councils. No affidavits are filed by the defendants to shew that it has been repealed, or to support any objection of alleged delay in the application to quash.

We think the case of *Baker v. The Municipal Council of Paris* (10 U. C. R. 623), is an authority for holding that the by-law is sufficiently authenticated by the corporate seal. The clerk's certificate does not mention the seal, but it is placed, as in the case cited, opposite the clerk's signature.

On the merits, it is sufficient for us to refer to the case decided last term, *In re Scott and the Corporation of Peterborough*, quashing the county by-law directing Smith and Harvey to levy these rates, (25 U. C. R. 453.)

The statutes there and on this application referred to, direct the assessment and levy to be made on a certain class of individuals, viz., the proprietors of the lands in each concession or part of a concession interested. The by-law before us directs the rate to be assessed and collected, not on or from individuals, but “on all lands patented, leased, sold, agreed to be sold and located as free grants, within said township of Harvey.” We think this wide departure from the statute cannot be allowed.

As to the objections to the re-survey of the whole township, instead of each concession or part of a concession, we think the argument against the legality of such a course is of great weight, and probably might be fatal to the by-law if it stood alone.

We found our judgment on the other point and the decided cases, leaving it still open for argument should the point again arise.

Rule absolute. (a.)

During this Term the following gentlemen were called to the Bar :—ROBERT CASSELS, Junior, FRANKLIN METCALFE GRIFFIN, JOHN McCABE, EDWARD FURLONG, WILLIAM EBENEZER LEES, BARTON STEPHEN GILBERT, WILLIAM HENRY SULLIVAN, ROBERT THOMPSON LIVINGSTONE, HEWITT BERNARD, DONALD GUTHRIE, WELLINGTON AULT.

MICHAELMAS TERM, 30 VICTORIA, 1866.

(November 19th to December 1st.)

Present :

THE HONORABLE WILLIAM HENRY DRAPER, C. B., C. J.

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

IN THE MATTER OF SCOTT AND THE CORPORATION OF THE
COUNTY OF PETERBOROUGH.

C. S. U. C. ch. 93—Re-Survey of Township.

The County Council, under Consol. Stat., U. C., ch. 93, sec. 6, having caused the re-survey of an entire township, and directed a certain sum to be levied for the expenses, by a by-law which had been quashed, by a subsequent by-law directed the collection of a further sum for the purpose, to be levied on the proprietors of land in the township in proportion to the quantity of land held by them respectively in such township. This by-law was quashed, on the grounds, 1. That the Statute does not authorise the re-survey of a whole township, 2. that it directs the expense of each concession to be borne by the proprietors of land there.

Robert A. Harrison, in Trinity Term last, obtained a Rule *nisi* to quash By-law No. 281 of the County of Peterborough, passed on the 28th June, 1866, entitled “A By-law to provide for the raising of a sum of money in connection with the re-survey of the township of Harvey”—on the grounds,

1. That the same is a continuation of and dependent on a portion of By-law No. 262 of the said corporation, which has been quashed. 2. That the corporation had no power to pass two concurrent by-laws to defray the expenses of the re-survey of the township of Harvey, nor to pass either of said by-laws for that purpose. 3. That the jurisdiction or power, if any, of said corporation to levy or direct the levy by the township of Harvey of the sum of \$218 is not shewn on the face of the by-law, nor that such a survey as the Statute contemplates had previously been made. 4. That the sur-

vey was not in fact such a survey as the Statute contemplates. 5. That the said sum, if leviable at all on the proprietors of lands in said township, should be directly levied on them by a by-law of the county, and not delegated by the county to the Township Corporation. 6. That if leviable by a general by-law of either corporation, then not only lands patented, but lands sold or agreed to be sold by the Crown should be made subject to said levy.

The by-law recited that in addition to the sum of money mentioned in by-law 262, in relation to the expenses incurred in the re-survey of the township of Harvey, a further sum of \$218 was necessary to be raised for the purpose of paying the balance in arrear of such expenses:— and it enacted, &c., “that the Corporation of the Township of Harvey do cause to be levied on the proprietors of lands within the said township of Harvey, in proportion to the quantity of land held by them respectively in the said township, the said sum of \$218 for the purpose aforesaid, in the same manner as any other sum required for any other purpose authorized by law, may be levied.”

It was proved by affidavit that the by-law 262 above quoted was quashed by rule of this court a few months ago, and the certified copy of that by-law then filed was re-filed by leave of the court on this application. The clause of that by-law which had been quashed was as follows: “And be it further enacted, that the municipality of Smith and Harvey be required, and they are hereby required, to levy and collect from the patented and leased lands of the township of Harvey such a rate as will produce the sum of \$2,541 05 to reimburse the expenses of the re-survey of the said township of Harvey.”

During this term, *C. S. Patterson* shewed cause, citing *Fisher v. Municipal Council of Vaughan*, 10 U. C. R. 492.

Robert A. Harrison supported the rule, and cited *Moore v. Hynes*, 22 U. C. R., 107; *Scott and The Corporation of Peterborough*, 25 U. C. R. 453.

HAGARTY, J.—After a full consideration of the Statutes we have arrived at the conclusion that such a resurvey of an entire township as appears to have taken place here does not fall within the powers given by the Legislature.

Section 6 of the Upper Canada Survey Act, ch. 93, says “Whereas in several of the townships in Upper Canada some of the concesssion lines, or parts of the concession lines, were not run in the original survey performed under competent authority, and the surveys of some concession lines or parts of concession lines have been obliterated, and owing to the want of such lines the inhabitants of such concessions are subject to serious inconvenience; therefore the County Council of the county in which any township in Upper Canada is situate, may, on application of one half of the resident land-holders in any concession, (or may without such application) make application to the Governor requesting him to cause any such line to be surveyed, and marked, * * *at the cost of the proprietors of the lands in each concession or part of a concession interested.*”

Section 7 directs that “the lines shall be so drawn as to leave each of the adjacent concessions of a depth proportionate to that intended in the original survey.”

Section 9. “The council shall cause to be laid before them an estimate of the sum requisite to defray the expenses to be incurred, in order that the same may be levied on the said proprietors, in proportion to the quantity of land held by them respectively in such concession or part of a concession, in the same manner as any sum required for any other purpose authorized by law may be levied;”

In framing these sections it would certainly seem that no general survey of an entire township was contemplated by the Legislature. We should incline to give the most liberal constructions to the words used, so as to meet the possible case of an obliteration of all the concession lines in a township. But the difficulty at once arises that in the re-surveying of the whole township, as here, the cost of the whole in one sum is required from the land-holders in proportion to the quantity of land in the township respectively

held by them, whereas the statute throws the burden of the survey of each concession or part of a concession on them in proportion to the quantity of land held by them respectively in such concessions or parts of a concession. The county council can have no right to place the burden otherwise than as the statute seems expressly to direct.

Each concession should bear the cost of its re-survey. This by-law throws it on the township generally. If in concession No. 1 there were fifty land-holders, each owning 100 acres, the cost of its survey could be easily apportioned amongst them. If concession No. 4 had only thirty land-holders, the same process could be applied. Practically it might be much more costly to run the lines of one than of the other, from the extent of the obliteration.

But if the aggregate cost of both surveys be directed to be levied of all the land-holders in the two concessions according to the quantity of land held by each in them, the burden would not be borne as the law directs. A man owning 100 acres in concession 1 might own 500 in concession 4. The illustration can easily be extended to the case of a re-survey of the township.

Section 7 also seems to point a survey of a concession only, by providing for leaving each adjacent concession of a depth proportionable to that intended in the original survey. If in one concession or part of a concession, where the line had become obliterated wholly or in part, there was found a deficiency of land in depth, the adjacent concession whose line was still traceable must not suffer diminution. In the re-survey of a whole township this provision would seem not very applicable.

We regret any difficulty that may be caused by the repeated judgments of this court as to these surveys. We have no alternative but to see that the statutes are observed.

We think the by-law must be quashed with costs.

DRAPER, C. J.—I concur in the decision, upon the broad ground that the powers to tax confided to the councils of municipalities can only be exercised in the manner specified

by the act, and that where the Legislature have seen fit to direct that the expense of a re-survey of each concession shall be borne by the owners of land in that concession, though every concession in that township has been re-surveyed, the expense of each belongs to the land holders of each, and the whole is not to be levied on all the proprietors of the township.

MORRISON, J., concurred.

Rule absolute. (a.)

THE CORPORATION OF THE COUNTY OF PETERBOROUGH V.
THE CORPORATION OF THE TOWNSHIP OF SMITH.

Re-survey of townships—Consol. Stat. U. C., ch. 93—Right of action by the County.

Declaration, that the plaintiffs, pursuant to the statute, applied to the Governor to have the concession lines in the defendants' township re-surveyed, which was ordered accordingly, and the expense paid by the plaintiffs; that the plaintiffs thereupon directed the defendants to levy and collect the money so paid, but although they did levy part they refused to pay the same to the plaintiffs. *Plea*, that the only direction was by the plaintiffs' by-law, which before suit was quashed.

Held, on demurrer, that the declaration was bad for not shewing a by-law, as the plaintiffs could proceed only in that way; and that the plea was good.

Quere, whether the money can be levied before the survey has been actually made.

DECLARATION, for that the plaintiffs, under the provisions of the statute in that behalf, made application to the Governor, requesting him to cause the concession lines in the township of Harvey, then united with the said township of Smith, and being the junior township of such union, to be re-surveyed under the direction and order of the Commissioner of Crown Lands, in the manner prescribed by the act respecting the survey of land in Upper Canada, and the Governor in Council ordered the same to be done accordingly, and the Commissioner of Crown Lands certified that the sum of \$2541.05 was payable, and ordered the same to be paid by the county treasurer of the said county of Peterborough to the persons employed in the said services, and

(a) See the last and the next cases.

the same was paid accordingly by the said treasurer. And the plaintiffs thereupon directed the corporation of the then united townships of Smith and Harvey to levy and collect the said sum so paid by them as aforesaid, and it became and was the duty of the said corporation of the then united townships of Smith and Harvey to levy the same as by law directed, and to pay the same to the plaintiffs. And afterwards the said township of Harvey was separated from the said township of Smith in the manner and form prescribed by law. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to maintain this action. And although the defendants did levy and collect a large portion of the said sum of money, yet they neglect and refuse to pay the same, or any part thereof, to the plaintiffs. And the plaintiffs say that the said united townships of Smith and Harvey have not, nor have said defendants, levied and paid the said money, as it became and was their duty, and as by law they were required to do.

The defendants were allowed to demur and plead to this declaration, as follows :

Demurrer, on the grounds :—1. That the said first count does not show any facts from which a duty would arise as against the defendants to levy, collect, or to pay over to the plaintiffs the money therein claimed, or any part thereof. 2. That the duty, if any, was upon the corporation of the united townships of Smith and Harvey, and not the defendants. 3. That the said count does not show how the defendants were directed to levy and collect the said moneys from the persons liable by law to pay the same for the purposes in the first count mentioned. 4. That it is not alleged that the said defendants or the said united townships were directed to levy, or did levy, said moneys from the resident landholders and proprietors in said townships, or either of them. 5. That it is not alleged or shewn, that any by-law was passed by the plaintiffs directing the levy or collection of said moneys according to law.

Plea.—That the alleged direction to the said corporations of the townships of Smith and Harvey, to levy and collect the moneys in said count mentioned, was contained in a certain by-law of the plaintiffs (The Corporation of the County of Peterborough), passed on the 24th of June, 1865, and not otherwise, and that so much of the said by-law as directed the said levy and collection was afterwards, and before the commencement of this suit, by the judgment of the Court of Queen's Bench at Toronto, having jurisdiction in the premises, in due course of law ordered to be quashed and set aside as illegal, which said judgment or order is still in full force, and is no way annulled or vacated.

The plaintiffs demurred to this plea, on the grounds, that the said direction of the plaintiffs to the corporation of the townships of Smith and Harvey was not by law required to be given by by-law, and therefore the allegation that the said by-law was quashed forms no answer to the said count; that the levy and collection of the said moneys can only legally be made under a by-law of the defendants, and not under a by-law of the plaintiffs.

Hector Cameron, for the plaintiffs, cited *Roach v. Municipal Council of Hamilton*, 8 U. C. R. 229.

Robert A. Harrison, contra, cited *Mellish v. Town Council of Brantford*, 2 C. P. 35.

HAGARTY, J., delivered the judgment of the court.

It is not easy to see with much certainty how the legislature contemplated the collection of the cost of a survey of this description. Section 9 of the Upper Canada Survey Act, ch. 93, directs that the county council shall cause to be laid before them an estimate of the sum requisite to defray the expenses of survey, &c., "in order that the same may be levied on the said proprietors, in proportion to the quantity of land held by them respectively in such concession or part of a concession, in the same manner as any sum required for any other purposes authorized by law may be levied."

Section 75 of the Assessment Act (Consol. Stat. U. C., ch. 55) declares, "When a sum is to be levied for county purposes, *or by the county for the purposes of a particular locality*, the council of the county shall ascertain, and by by-law direct, what portions of such sum shall be levied in each township, town or village, in such county or locality;" and section 76 directs the county clerk to certify yearly to the township clerk "the total amount which has been so directed to be levied therein for the then current year, for county purposes, or for the purposes of any such locality," and the township clerk shall calculate and insert the same in the collectors' roll for that year. Section 187 of the Municipal Act (Consol. Stat. U. C., ch. 54), says, "The powers of the council shall be exercised by by-law when not otherwise authorized or provided for."

The nearest approach to the case before us would be in the words, to be levied by the county *for the purposes of a particular locality*. This must be done by by-law.

The plaintiffs' declaration is therefore met by the plea, that the direction by them to levy the amount was by by-law and not otherwise, and that the said by-law was quashed before the bringing of this suit.

The plea seems to us to be a good bar. Even if the plaintiffs could require the amount to be levied otherwise than by by-law, still the plea avers, and it is admitted by the demurrer, that the only requirement or direction to levy was in fact by the quashed by-law, and not otherwise; so that the groundwork for the alleged duty is taken away.

As we arrive at the conclusion that the plaintiffs must proceed by by-law, whether they call on the township to make the levy or attempt so to do by their own direct power, if any such power exist, it does not seem necessary to discuss the various points suggested by the demurrer.

It will always be more advisable to discuss the true effect of the statutes whenever the plaintiffs may pass any by-law to direct the payment or levying of this money.

The court can then examine the proposed course of proceeding, and decide on its validity.

Very great difficulties present themselves to the enforcement of this claim, from the loose and uncertain language of the statutes.

This court has decided this term on one of the objections taken—viz., whether a survey of an entire township, and not of a concession or part of a concession, is a survey contemplated by the act—against the validity of such a proceeding (*ante*, page 36).

There is no statement whatever in the declaration that the survey has been made. No objection was urged by the defendants on that ground, and the statute is not very clear as to whether the proprietors of the land can be called on or not before the work is done. If it can be demanded in advance (a matter on which we give no opinion), there would be even a stronger reason for all the statutable formalities of a by-law being required.

We think the defendants are entitled to judgment. We hold the count bad as not shewing a by-law, and also on the ground that the re-survey of the whole township, and the manner of levying the expense, is illegal. We also hold the plea good.

Judgment for defendants. (a).

(a.) See the last two cases.

POMEROY, APPELLANT, AND WILSON, RESPONDENT.

Quarter Sessions—Right to reserve a case—C. S. U. C. ch. 112.

The appellant having been convicted before Justices of having pretended to be a Physician, contrary to 29 Vic. ch. 34, appealed to Quarter Sessions, and, was found guilty. *Held*, that the Sessions had no power to reserve a case for the opinion of this court under Consol. Stat. U. C. ch. 112, the appellant not being a person "convicted of treason, felony or misdemeanor."

Seemle, that if the 29 Vic. had in terms declared the act charged unlawful it would have been an indictable misdemeanor.

THIS was a case reserved for the opinion of this court, by the Quarter Sessions of the County of Hastings.

The appellant, on the 9th July, 1866, was convicted before three Justices of the Peace of the county, of having wilfully and falsely pretended to be a physician and general practitioner, contrary to the provisions of 29 Vic. ch. 34; and adjudged to pay \$25 with \$11 25 costs, and in default of payment within ten days to be imprisoned until both sums should be paid.

He appealed to the next General Quarter Sessions of the Peace, where he was found guilty by a jury; and the chairman reserved certain questions for the opinion of this court.

Jellett, for the appellant, referred to *In re Stewart and Blackburn*, 25 U. C. R. 16.

Holden, contra.

HAGARTY, J., delivered the judgment of the court.

By ch. 112, Consol. Stat. U.C., when a person is convicted of treason, felony or misdemeanor before certain courts, including Quarter Sessions, the court may reserve any questions of law arising on the trial for one of the Superior courts.

By sec. 3 the Superior Court may reverse, affirm or amend any judgment given on the indictment or inquisition on the trial whereof the question arose.

Ch. 114 Consol. Stat. U. C. provides for appeals to Quarter Sessions. Sec. 1 declares that the court shall hear and

(a). See the last and the next cases.

determine the matter of the appeal, and make such order therein, with or without costs, as to the court seems meet; and in case of the dismissal of the appeal or affirmance of the order, decision or conviction, the court shall order the order or conviction to be enforced. Sec. 3 allows a jury to be empannelled to try the matter of the complaint, and the court on the finding may give judgment, not exceeding the amount that might have been imposed by any law giving cognizance to the justices, &c.

29-30 Vic. ch. 50 directs the Quarter Sessions to which the appeal is made to hear the complaint on which the conviction is had upon the merits, notwithstanding any defect of form or otherwise in the conviction; and if the person charged be found guilty, the conviction shall be affirmed, and the court shall amend the same, if necessary, and any conviction so affirmed or affirmed and amended shall be enforced in the same manner as convictions affirmed in appeal are now enforced.

If this case be unaffected by previous decisions, we should be strongly of opinion that there was no right to reserve questions of law for the consideration of the Superior Court by the Court of Quarter Sessions hearing an appeal from a Justice's conviction. We do not think the appellant in this case falls within the description of "a person convicted of treason, felony or misdemeanor" before a court of Quarter Sessions, nor could the Superior Court "reverse affirm or amend any judgment given on the indictment or inquisition on the trial." The whole scope of the act and the schedule attached seems to point to a different class of cases.

We do not understand that the affirmance of a Justice's conviction at Quarter Sessions, and the consequent order, thereon that the conviction be enforced, brings the appellant within the statutable description of a person "convicted of a misdemeanor," nor that the affirmance of an appeal will fall within the 3rd section of ch. 112, already cited, of a "judgment given on the indictment or inquisition, on the trial whereof" the question reserved arose.

Sec. 4 directs that the judgment of the Superior Court shall be certified as directed to the clerk of the peace "who shall enter the same on the original record in proper form." This is where judgment has been given. Where it has not been given, the court below shall be directed to give judgment.

We think all the provisions and the whole language of the act tend to shew that appeals from Justices' convictions do not fall within chapter 112.

Sec. 5 of ch. 114 already noticed, declares that appeals shall lie to Quarter Sessions from all convictions for offences against municipal by-laws. In the absence of express enactment it is not easy to see how every person charged or convicted of breaking some trifling market regulation can be held to fall within the description of "a person convicted of treason, felony or misdemeanor," if the conviction against which he appeals be affirmed at Quarter Sessions.

For these reasons we think there was no power to reserve this case.

If the conviction and proceedings, even when affirmed by the Quarter Sessions, are defective in law, shewing an absence of any legal offence, there is a remedy, as in *Hespeler*, appellant v. *Shaw*, respondent (16 U. C. R. 104.)

The act of last session gives full power to the Quarter Sessions to hear the complaint on its merits, and to amend the conviction if the appellant be found guilty. An adoption of this course would render it unnecessary to reserve any question as to the conviction being good or bad on its face.

The appellant in this case seems to have been rather hardly dealt with. It is not possible to read the evidence without some feeling of surprise that Justices of the Peace have convicted him, and a jury afterwards affirmed their proceeding.

We are not prepared to hold that the matter of the appeal constitutes what the law calls an "indictable misdemeanor."

If the medical act of 1864, in terms declared that it should not be lawful for any person to do what the appellant is charged with doing, then, according to the authorities, it

seems the doing of it would be indictable, even if the act prescribe a summary remedy. See Russell on Crimes, vol. 1 p. 86, *et sequ.* (Ed. of 1865); *Rex v. Gregory* (5 B. & Ad. 555.)

Now the medical act has no such prohibition in terms. Sec. 32 enacts that "any person who shall wilfully and falsely pretend to be, or take or use any name," &c., "implying that he is registered under this act, shall, upon prosecution and conviction in any court of competent jurisdiction, forfeit and pay a penalty not exceeding \$100, and every such penalty shall form part of the funds of the Council," &c. No method is pointed out for prosecuting this claim.

Sec. 34 seems to be that on which this conviction proceeded—that any person wilfully, &c., pretending to be, or take, or use, the name or title of a physician, doctor, &c., or any name or title, &c., implying that he is registered under this act, shall, upon a summary conviction before any Justice of the Peace, &c., pay a sum not exceeding \$50, and in default to be committed to gaol till the same be paid. (a)

(a) As the court held that the case had been improperly reserved, no judgment was given upon the questions raised.

See *The Queen v. Clark*, L. R., 1 C. C. 54.

MERRILL V. COUSINS.

Letters Patent—Invention—Novelty.

The plaintiff obtained a patent for a platform pump, constructed upon the principle and for the purpose of raising water for animals to drink from wells by their own weight and act, the specification claiming such principle as his invention. He sued for the infringement of this patent. It appeared that an inclined platform working upon a fulcrum led up to the trough, and that being depressed by the weight of the animal when near the trough, it forced down the piston rod and plunger, with which it was connected, thus driving the water up a pipe into the trough. There was nothing new either in the different parts or in the principle on which they produced their effect, but the novelty, if any, was in the combination.

Held, that the patent, not being for such combination, but for the principle, could not be sustained.

Semble, that the utilizing the instinct of the animal to seek water was the only novelty, and that this could not be the subject of a patent.

The infringement complained of was a pump for which defendant had obtained a patent, and it was objected that this patent was an answer to the action until set aside; but *semble*, clearly not.

THE declaration stated that the plaintiff was the inventor of a platform pump constructed upon the principle of raising water "for animals to drink from wells by their own weight and act," and obtained letters patent for such invention for this Province for fourteen years; and complained that defendant had infringed this patent right.

Second count, that the plaintiff was the inventor of a certain platform pump, "constructed upon the principle and for the purpose of raising water for animals to drink from wells by their own weight and act, and with a certain cylinder, piston, and valve, and with a certain mode of attaching the pipe to the cylinder," and obtained letters patent, as in the first count, charging infringement by the defendant.

Pleas.—1. Not guilty. 2. To the first count, that the plaintiff was not the first and true inventor. 3. To the first count, that the invention was not new. 4 and 5. To the second count, the same as the second and third to the first count.

The trial took place at Simcoe, in October last, before Adam Wilson, J.

The plaintiff put in evidence letters patent dated the 3rd of December, 1858, such as were stated in his declaration, and gave evidence to shew that he was the first inventor.

The defendant got a patent in 1865 for a machine which was substantially founded on the same principle and the same mode of using it, but with an additional lever, which it was sworn increased the power and regulated the action of the machine better than the plaintiff's was regulated by his *modus operandi*.

It was proved on the defence that none of the parts of either machine were new: that the principle of forcing up water by the application of weight or power was commonly known and in use: that whether the power was mere weight of an animal which was driven or walked on to a platform, the ends of which rose or fell according as weight was placed upon or weight removed from one end of it, or a more direct application of force, the principle by which the water was raised was a well known one; and if there was any novelty in the plaintiff's machine, it was only a novel combination of parts, but no novelty in the principle as the declaration stated. It was also endeavoured to be proved that the invention was not new, but had been in use long before the plaintiff got his patent.

The principal question submitted to the jury was as to the novelty of the invention, and the plaintiff being the first and true inventor; and upon this the jury found for the plaintiff.

M. C. Cameron, Q. C., obtained a rule calling on the plaintiff to shew cause why there should not be a new trial, the verdict being contrary to law and evidence, and for misdirection, in telling the jury that the plaintiff's patent would not be void although the alleged invention had been used in the United States, unless the same or some material part thereof had before been patented or described in some printed publication, without coupling with such direction the condition that it was satisfactorily shewn by the plaintiff that at the time he applied for the patent he believed himself to be the first inventor; and in not telling the jury that the defendant having obtained a patent for an invention, he was, until such patent was set aside, protected thereby from

being guilty of infringing the plaintiff's patent by working a machine under his own patent which resembled the plaintiff's invention; and in not telling the jury that the plaintiff having merely combined well known pieces of machinery, he could not thereby preclude other persons from using the same things in a combination for the same purpose and improving thereon; and in not telling the jury that if the plaintiff had not patented the combination simply, but had patented a platform and other parts of a pump well known and long in use, the patent would be too large and void.

D. B. Read, Q. C., and *Boyd*, shewed cause, citing *Godson* on Patents, 46-48, 237, 246-7; *Webster's Patent Cases*, 508; *Lund* on Patents, 31-33, 38, 56, 62; *Carpmael* on Patents, 17; *Coryton* on Patents, 94; *Lewis v. Marling*, 10 B. & C. 22; *Sir Oliver Butler's Case*, 2 Ventr. 344; *Carpenter v. Smith*, 9 M. & W. 300; *Sellers v. Dickinson*, 5 Ex. 312, 320; *Newton v. Grand Junction R. W. Co.*, 5 Ex. 331, note; *De Rosne v. Fairrie*, 5 Tyr. 293; *Oxley v. Holden*, 8 C. B. N. S. 666; *Spencer v. Jack*, 11 L. T. Rep. N. S. 242; Consol. Stat. U. C. ch. 34, sec. 25.

M. C. Cameron, Q. C., and *C. Robinson*, Q. C., supported the rule.

DRAPER, C. J.—Upon the best consideration I can give, I think this patent cannot be sustained, upon the grounds that the evidence fails to establish that the invention has in truth that novelty that I understand from the cases is essential to its validity; and that, though there may be a novelty of combination in this platform pump, the patent is not for such combination, but for a principle which, so far as I comprehend its meaning, is not new.

To raise water by means of a forcing pump is certainly no new invention, and looking only at the model which was before the Court, and at the specification or description, it is only a forcing pump which the plaintiff's patent covers. The piston rod is attached to a solid piston or plunger made to fit the cylinder without requiring extreme closeness, and

into the lower end of the cylinder is fitted a pipe up which the water is to be forced, and from the upper end of which pipe the water pours into a reservoir, out of which cattle may drink. The cylinder is placed in a well. When it is full of water the plunger is at the top, and being pressed down, the water, having no other escape, passes into and up the pipe. The cylinder has two valves opposite each other, one to admit water from the well, which closes when the plunger descends, the other at the pipe which opens outwards, and continues open as long as water is being forced into the pipe, but is closed by the pressure of the water in the reservoir and pipe when the plunger is down, and while it is raised again, and the water flows into the cylinder through the opposite valve.

There is nothing new in this, either in the different parts or the principle on which they produce their effect. The upper end of the piston rod is however attached to a platform, and here the asserted novelty begins. This platform works upon a fulcrum placed nearer to the reservoir than to the opposite end of the fulcrum. At this end cattle are intended to step on to the platform, which forms an inclined plane from the reservoir. When an animal passes the fulcrum, that end of the platform begins to descend, and this presses down the piston and forces the water up the pipe into the reservoir, where the animal can drink it, and in order to pump up more the animal must go off the platform, or at least to the end of it furthest from the reservoir, and then cross the fulcrum again.

If the principle is treated as the simple application of weight to make the piston descend into the cylinder, and so work the pump, it will not, I presume, be contended that it has any novelty, and it sounds absurd even to ask whether the weight of a live animal, or a mere dead weight, or a force of pressure equal to the same given weight thus applied, is really a new principle so as to sustain a patent. The only novelty I can detect is, the utilizing the instinct of the animal which induces it to seek for water in the reservoir in which it had previously found it, and thus to obtain the weight necessary

to make the pump act. According to the evidence, the use of a platform, pressure upon which will raise water, is not new, and no other of the parts by the combination of which water is so raised are new, nor is the combination of the parts which constitute a forcing pump new.

The only words by which the patent refers to this acquisition of what I may term the motive power are "by their own weight and act," which conclude the definition of the principle patented, namely, "raising water for animals to drink from wells, by their own weight and act." I confess my inability to consider this as a new machine to raise water, and the method of working the platform by the living and thirsty animal does not appear to me to be, nor indeed is it claimed as, a *new combination* of any machinery or processes in use before. A patent will be good for such a combination, but then it must not be a patent for the old parts or principles, but for the new thing produced by the combination, for combining things before known with something newly invented, so as to produce an effect not before attained. *Manton v. Manton*, (Dav. Patent Cases, 346, cited in *Godson*, 64.)

In *Hill v. Thompson* (3 Mer. 629), Lord *Eldon* says, "The specification must not attempt to cover more than that which, being both matter of actual discovery and of useful discovery, is the only proper subject for the protection of a patent. * * If a patentee seeks by his specification any more than he is strictly entitled to, his patent is thereby rendered ineffectual even to the extent to which he would be otherwise fairly entitled." And in regard to a new combination of or new method of applying materials, the Lord Chancellor adds, "In order to its being effectual, the specification must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merit of original invention in the use of the materials. If there be a patent both for a machine and for an improvement in the use of it, and it cannot be supported for the machine, although it might for the improvement merely, it is good for nothing altogether."

Now the wind up of the plaintiff's specification is, "What I claim as my invention is the principle of raising water for animals to drink from wells by their own weight and act, as shewn in the platform pump; also the construction of the cylinder, piston and valves, and the mode of attaching the pipe to the cylinder," as to which mode I have not been able to find any description either in the drawing or specification.

Now assume this machine complete and ready for use, what is there novel about it in principle or in detail? The various parts according to the evidence are old. They are divisible into two, the forcing pump and the platform, the former undoubtedly well known, the latter proved to have been in use for the purpose of raising water. If neither of these be new, it will not, I assume, be asserted that any new principle is discovered in the fact that if on a platform resting on a fulcrum, as described by the specification, and while not in use forming an inclined plane, a sufficient weight be placed on the upper end, it will descend, and thus a power will be gained or brought into existence continuing to operate until the weight is removed. If so far there is nothing new, then the remainder is no more than this—the weight is that of a living animal driven on or stimulated to go on to the platform by the instinct to which I have referred.

The specification does not explain whether the animal is to be driven on or is left to go on by its own act to apply its own weight. I presume it is not meant that to bring the principle into operation the animal should be driven on; if so, I do not see the novelty of the *principle*, which then must depend upon the difference of putting on the live weight of an animal which may drink, if thirsty, or a mere dead weight; and if the animal is left to itself, the principle is the utilizing the instinct of a thirsty animal to set the platform pump into operation. If this be so, the patent covers much more; and according to Lord Eldon's judgment above referred to, is void, and the last objection taken in the rule is sustained.

It may be as well to observe, as to the second objection taken in the rule, that as at present advised I attach no weight to it; and as to the first, so far as it was referred to at the trial, I agree with the learned judge's ruling.

In my opinion the rule must be made absolute without costs.

I refer to *Emery v. Iredale* (11 C. P. 106) where most of the cases are collected.

HAGARTY, J.—In *Newton v. Grand Junction R. W. Co.* (5 Ex. 331, note) it was held to be a correct direction to the jury that if a patent was granted for a new combination of several things known before, this did not prevent any one from using what was old, and that it was for the jury to say whether the part here used by defendant was substantially the same thing as the plaintiff's invention.

In giving judgment, the Chief Baron says, "It was argued, that the same criterion is to be applied to the question of infringement as to that of novelty. But that is not so. In order to ascertain the novelty, you take the entire invention, and if, in all its parts combined together, it answers the purpose by the introduction of any new matter, by any new combination, or by a new application, it is a novelty entitled to a patent. But in considering the question of infringement all that is to be looked at is, whether the defendant has pirated a part of that to which the patent applies; and if he has used that part for the purposes for which the patentee adapted his invention, and for which he has taken out his patent, and the jury are of opinion that the difference is merely colourable, it is an infringement."

In *Lister v. Leather*, (8 E. & B. 1023) Lord Campbell reviews the cases, and adds, "They establish that a valid patent, for an entire combination for a process, gives protection to each part thereof that is new and material for that process, without any express claim of particular parts, and notwithstanding that parts of the combination are old."

In the same case in Error, Williams, J., giving the judgment of the court, says, "It may be that a combination is

not distinctly and expressly claimed in either of these patents. But neither a claim nor a disclaimer is essential to a specification. That which appears to be the invention, or a part of it, will be protected though there be no claim; and those matters which manifestly form no part of the invention need not be disclaimed."

Our Court of Common Pleas, in *Emery v. Iredale*, (11 C. P. 106), had occasion to consider the questions arising in the two last cited cases; and it was held that a defence of a specification being too large, or that the patent is not taking out for a combination merely, must be raised by special plea, on the authority of *Bateman v. Gray* (8 Ex. 909).

Tetley v. Easton (2 E. & B. 965), strongly shows the necessity for a specification not claiming too much: that a claim for what was clearly old, equally with what was new and useful, must on a proper plea be fatal to a plaintiff.

I agree in holding that the plaintiff must fail, on the ground that his alleged invention was not new. I am further of opinion that the placing a platform on which a thirsty animal will probably walk to a well, and thereby provide the weight in the right place to force the water up, is not a proper subject for a patent.

MORRISON, J., concurred.

Rule absolute, without costs. (a).

(a) *Read*, Q.C., asked leave to appeal, but the Court refused the application.
See *Jordan v. Moore*, L. R., 1 C. P. 624.

SMITH V. ARMSTRONG.

Slander—Privileged Communication.

Defendant, a Government detective, knowing that one M. was in partnership with the plaintiff, informed him that the plaintiff was connected with a gang of burglars which defendant had been the means of breaking up, and put him upon his guard. *Held*, that the communication was privileged, and, there being no evidence of malice, that the plaintiff was properly non-suited.

SLANDER, for saying of the Plaintiff "Smith has been engaged with a gang of burglars which I have been the means of breaking up. He was engaged by them as a spotter."

In a second count of the declaration it was stated, by way of inducement, that the plaintiff sold lightning rods in partnership with one Jno. McD., and the following words were charged as being spoken by defendant to Jno. McD., "You must look out for Smith. He is a bad man. You had better look out for him. Smith has been engaged with the gang of burglars which," &c., as in the first count.

Plea, to each count, not guilty. Issue.

The case was tried in October last, at Guelph, before Adam Wilson, J.

John McDougall was the only witness. He said the plaintiff was engaged by him in selling galvanized line wire, and then was a partner with him in putting up lightning-rods, and was about the country continually in his business: that the witness was travelling in the railway cars, and defendant spoke to him about the plaintiff, prefacing his statement by saying that the plaintiff was engaged with the witness in the lightning-rod business. The defendant then used the words charged in the second count. The witness asked the meaning of the the word "spotter," and defendant said it was for marking out places to rob. The defendant told the witness not to tell anybody, but as plaintiff was his partner he told him what defendant had said, adding that the plaintiff must either enter an action against defendant, or get defendant to retract, or close up their partnership business. On cross-examination, the witness said he did not know—did not think he had promised to say nothing about it; that defendant

gave it to him in confidence; that it was a friendly conversation; he knew defendant before this; it struck him it was for his own good, to guard him against the plaintiff, that defendant told him, from his position as a Government detective. He (witness) took it for granted the defendant was telling the fact; but, as he said on re-examination, on consideration he thought the plaintiff could not be guilty, yet he had defendant's word for it, and it might have been true, and so he told plaintiff he must bring the action, and if he had not brought it he would have had to leave the witness's employment, though at the same time the witness would not have believed it.

The defendant's counsel urged that this was a confidential communication, and malice must therefore be proved.

The learned Judge thought such a communication made to a partner was made to a proper person, and being made by a person who was a detective was not made officiously; and being made in confidence, and for the partner's benefit, was in a proper manner and for a proper purpose, and was a privileged communication; and he non-suited the plaintiff.

Freeman, Q. C., obtained a rule calling on the defendant to show cause why the non-suit should not be set aside.

Alexander Miller shewed cause, citing *Cooke v. Wildes*, 5 E. & B. 340; *Shaver v. Linton*, 22 U. C. R. 177; *McDougall v. Campbell*, 1 Camp. 267, 269, note; *Fairman v. Ives*, 5 B. & Al. 642; *Richards v. Boulton*, 4 O. S. 95; Add. T. 681; *Harrison v. Bush*, 5 E. & B. 349; *McIntee v. McCullough*, 2 E. & A. Rep. 390.

Freeman, Q. C., contra, cited *McIntyre v. McBean*, 13 U. C. R. 534; *Getting v. Foss*, 3 C. & P. 160.

DRAPER, C. J., delivered the judgment of the Court.

We should probably have felt no difficulty in disposing of this case but for some of the remarks in the judgment of the Court in *McCullough v. McIntee* (13 C. P. 444) where it is said "The imputation of a fact, of which there is not the slightest kind of evidence given, rests upon the mere word or

belief of the defendant himself, and is entirely different from those cases where the defendant is commenting upon an unquestioned act or writing of the plaintiff, which is admitted or is in evidence before the jury; for in such a case the whole facts are before the Judge, and he can form an opinion by an examination of and judgment upon the complete case; but the Judge here could not say upon this trial the statement was privileged, because the occasion was; for, firstly, there was no evidence of any such offence having been committed by any one at the time referred to by the defendant." &c.

If this be literally followed, it may be said, that here the imputation that the plaintiff was engaged as a "spotter" by a gang of burglars which the defendant had been the means of breaking up, rested upon the mere word of the defendant himself, and that it was not further sustained by the slightest kind of evidence, and hence, though the learned Judge could rule that the occasion was privileged, he could not say the imputation was so, as there was no evidence of any such offence having been committed by the plaintiff or any one. This case, however, has been reversed by the Court of Appeal, (2 E. & A. 390).

We think, however, upon the authority of other cases this nonsuit was proper. In *Campbell v. Spottiswoode* (9 Jur. N. S. 1077) Crompton, J. is reported to say, "By privilege, I understand that immunity attaching to a particular class of persons, or to an individual, who, being placed in some particular position, or being charged with the performance of particular duties, derive therefrom rights which are not shared by the community at large. And Blackburn, J., in the same report, says, "The word 'privilege' signifies that species of immunity attaching to a person who, by reason of the circumstances of his position, is justified in uttering or writing of another matters which, if uttered or written by a third party, would be libellous or slanderous, as the case may be." This case is also reported in 3 B. & S. 769, where the dicta of these learned Judges are more concise and not so suggestive.

We also refer to *Cowles v. Potts* (11 Jur. N. S. 949) which quotes the language of Parke, B., in *Toogood v. Spyring* (1 C. M. & R. 181), "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, *the occasion prevents the inference of malice*, which the law draws from the unauthorized communication, and affords a qualified defence, depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." Blackburn, J., proceeds to say this exposition of the law has been approved of, "the difficulty felt being in the application of the rule to the particular case; and in the more recent decisions, such as *Whiteley v. Adams* (10 Jur. N. S. 470) the tendency has been to extend the limits of the moral duty or reasonable exigency which authorizes the publication of defamatory matter."

In the case before us there was no intemperance of language or unnecessary violence of expression, which would furnish evidence of malice to be left to a Jury, and no other evidence of malice was given to sustain the action, except the words spoken on that occasion. If therefore the inference of malice, which such a charge or accusation would in ordinary cases have furnished, is repelled by the occasion on which it was made, there was nothing to go to the Jury.

Now the defendant, being a detective officer employed for the purposes of public justice, becomes aware of certain criminal conduct of the plaintiff; he meets with the witness McDougall, who is, as the defendant knows, in partnership in some business with the plaintiff, and he puts him on his guard, telling him what he had become aware of. The communication is made to no one else; it is doubtful if it was not confidentially made; it certainly was for McDougall's benefit, and related to a matter in which he had a deep

interest. We think it is not too much to say there was a moral though not a legal duty in the defendant to make the communication, and that in holding it to be privileged we do not go beyond the case of *Whiteley v. Adams*.

We think this rule should be discharged.

Rule discharged.

MYTTON V. DUCK, et al.

Highway—Shutting up—Soil in whom vested—C. S. U. C. ch. 54, sec. 336.

A highway, of which the origin was not clear, had been travelled for forty years across the plaintiff's lot, the patent for which was issued in 1836. The municipality in 1866 passed a by-law shutting up this road, but no conveyance was ever made to the plaintiff. They afterwards threw down a fence with which he had enclosed the old road, and took away gravel from it. The plaintiff having brought trespass—

Held, that he could not recover, for the user for thirty years after the patent would be conclusive evidence of a dedication as against the owner, and such dedication was equivalent to a *laying out* by him, so that the road, under C. S. U. C., ch. 54, sec. 336, was vested in the municipality.

TRESPASS, for breaking and entering the south half of lot 7, in the 12th concession of Howard, breaking down fences, destroying crops, and removing sand and gravel.

The defendant Duck pleaded—1. Not guilty; 2. Land not the plaintiff's. The other defendants pleaded not guilty by statute—being path-masters.

The trial took place at Chatham, in October 1866, before Hagarty, J.

The plaintiff derived title to the land under a patent to Israel Smith, dated 22nd April, 1836. His title thereto was admitted. In none of the deeds under which he obtained his title was there any reservation of a road; but it was admitted there had been a road travelled by the public for forty years previous to its being closed by by-law.

On the 10th November, 1855, the municipal council of the township of Howard passed a by-law, reciting a petition to them to open a road from Ridgetown to the rear of the Talbot street lots, on the side line between lots numbers 9 and

10, in the 10th, 11th and 12th concessions of Howard ; that the same had been surveyed and reported ; that it was necessary the road as travelled through the 10th concession in going from Ridgetown to Morpeth, remain unaltered through the 11th and 12th concessions ; and it enacted, that the established road should be the same as then travelled from Ridgetown to the front of lot number nine in the 11th concession, and from thence should be on the line between lots numbers nine and ten through the 11th and 12th concessions, to the concession line in rear of the 12th concession, so soon as the petitioners open the road and make it as good as possible for travellers, at their own expense, and that as soon as this was done it should be received and acknowledged by the municipality as a public highway, and that the old road as at present travelled from the front of the 11th concession on lot number nine to the rear of the Talbot street lots should be shut up and cease to be a highway to all intents and purposes whatever, and should become the private property of the parties owning the lands adjoining or through whose land it ran.

The municipal council passed another by-law on the 24th March, 1866, shutting up this old road, and professing to vest in the parties owning certain lots which such road led through (but not including the plaintiff's lot) the portion of the land or road which ran through their lands.

The old road, thus referred to, had been in use forty years, and ran through the plaintiff's land, and the trespass complained of was the throwing down a fence which the plaintiff had erected across this road, and the digging and taking away large quantities of gravel during the summer of 1866. There was abundant evidence of this trespass, and that the gravel was taken from a part of the old road upon the south half of lot seven in the 12th concession of Howard. Defendant Duck was a councillor and inspector of roads in that ward, the other three defendants were pathmasters, and it was admitted that the acts complained of were done by them as such officers.

The learned Judge expressed a clear opinion that upon this evidence the old road at the *locus in quo* was not vested in the plaintiff, and nonsuited him accordingly.

Neither party desired to raise any objection as to the sufficiency of the pleadings.

Robert A. Harrison obtained a rule calling upon the defendants to shew cause why the nonsuit should not be set aside.

Robinson, Q. C. shewed cause, citing Consol. Stat. U. C. Ch. 54, Secs. 313, 314, 336; *Corporation of Sarnia v. Great Western R. W. Co.*, 21 U. C. R. 59; *Regina v. Plunkett*, 21 U. C. R. 536; *Ash v. Somers*, 21 U. C. R. 191; *Winter v. Keown*, 22 U. C. R. 341; *Borrowman v. Mitchell*, 2 U. C. R. 155.

Robert A. Harrison, contra, cited *Belford v. Haynes*, 7 U. C. R. 464; *Marquis of Stafford v. Coyney*, 7 B. & C. 257; *Dawes v. Hawkins*, 4 L. T. Rep. N. S. 288; *Cox v. Glue*, 5 C. B. 533.

DRAPER, C. J., delivered the judgment of the Court.

According to the evidence, the old road must have been in actual use some years before the grant of the land under which the plaintiff derives title, and that grant is dated in 1836. There has been, therefore, a user commencing as against private owners thirty years ago. There is no clear proof of the authority under which it was opened; one witness said it was cut out by a Government grant, or as a county (meaning probably district) job. It was sworn that public money had been expended upon it during most of the time until the last three or four years, and it was asserted in argument and not denied that statute labour was done upon it, though I do not find this statement in the notes of the evidence.

No conveyance seems to have been made since the passing of the two by-laws to the plaintiff, though there seems to have been a resolution dated 23rd June, 1866, (not among the exhibits, any more than the by-law of March, 1866), that the plaintiff should be notified as to purchasing the old road.

Then does the road upon this state of facts come within the definition in Section 313, of the Consol. Stat. U. C., ch. 54, as a road "whereon the public money has been expended for opening the same, or whereon statute labour hath been usually performed," so as to vest the title to the soil thereof in the Crown. For by section 314, "unless otherwise provided for, the soil and freehold of every highway or road *altered, amended or laid out*, according to law," is in the the Crown; and section 336 declares that every public road, &c., in a city, township, &c., shall be vested in the municipality, subject to any rights in the soil which the individuals who laid out such road reserved, except any concession in a township, &c., taken and held possession of by an individual, in lieu of a road laid out by him without compensation therefor.

The words "altered" and "amended" in section 314, refer, we apprehend, to alterations and amendments made in the line or course of any existing road, under the authority of law, whereby some land is substituted for a part of an existing highway. The term "laid out" applies, we presume, to new lines of road considered necessary for public convenience, surveyed and adopted as our statutes authorized. The soil of allowances for roads reserved on original surveys of public lands, is never in practice granted by the Crown.

Sections 314 and 336 must, if possible, be construed so as not to conflict. We think they may be so construed, by limiting the operation of the latter, as suggested by Burns, J., in *The Corporation of Sarnia v. The Great Western Railway Company* (21 U. C. R. 64) to "cases where individuals have laid out streets or roads for the public," and they have by user or otherwise been adopted or confirmed as highways. If this road can be so considered, it will come within the provisions of section 336.

According to the evidence, the title was in the crown when the highway first came into use, and it may be inferred that at that time it was necessary for public convenience, and that the reserved allowances for roads could not in the then state of things be opened and used. No dedication can be

presumed on the facts as against the Crown from the mere fact of such user, and we assume that the lot as originally surveyed was granted without reservation of this road by the Crown. But as against the grantee and those claiming under him the public user without objection or interference on their part would furnish conclusive evidence of dedication, and then this road would, under the 336th section, be vested in the municipality, 'not perhaps in the strict letter but within the spirit of the language used, the dedication by permissive user being equivalent to a laying out of the road. The facts were not controverted. The user for perhaps forty years before the bringing of the action, in our opinion established conclusively a dedication, and the by-laws clearly did not pass the soil and freehold, though they renounced and extinguished the character of highway over the *locus in quo*. It may be that a difficulty has arisen as to the terms upon which the municipality will convey to the plaintiff, and hence this effort to establish his title independently of them, the road apparently being no longer in use.

We think the rule should be discharged.

Rule discharged.

CARRICK V. JOHNSTON.

Highway—Right to deviate from.

Trespass quare clausum fregit. *Plea*, that at the time when, &c., there was a highway adjoining the plaintiff's said land, which said highway was in certain places impassable and out of repair, wherefore defendant, for the purpose of using such highway, necessarily deviated a little therefrom on to the plaintiff's said land, going no further from said highway than was necessary, and returning thereto as soon as practicable, and doing no unnecessary damage in that behalf—which are the alleged trespasses.

Held, on demurrer, a good plea.

TRESPASS, for breaking and entering the plaintiff's land, the north east and south east parts of lot 21, on the Lake Shore, in the township of Ashfield, cutting down trees and underwood, and digging up the soil.

Plea, that at the time of the alleged trespass there was,

and of right ought to have been, a common and public highway adjoining the said land of the plaintiff in the declaration mentioned, for all persons to go and return on foot, and with horses, cattle and carriages, at all times of the year, at their free will and pleasure, which said highway was in certain places impassable and out of repair; wherefore the defendant, for the purpose of using and passing along the said highway, necessarily deviated a little therefrom on to the said land of the plaintiff adjoining, going no further from the said highway than was necessary, and returning thereto as soon as practicable, and doing no unnecessary damage in that behalf—which are the alleged trespasses.

Demurrer, on the grounds,

1. That said plea admits the plaintiff's cause of action without sufficiently avoiding the same.

2. That the mere fact of a highway being out of repair, without shewing that it was so from accident, casualty or emergency, does not give one of the public the right to trespass on lands of adjacent proprietors.

3. That when a road is permanently out of repair, there is no right continually to trespass on lands of an adjacent proprietor against his will.

4. That while the declaration charges several trespasses, the plea in effect answers only in part.

Robert A. Harrison, for the demurrer, cited *Orser v. McMichael*, *Tay. Rep.* 385; *Borrowman v. Mitchell*, 2 U. C. R. 156; *Taylor v. Whitehead*, *Doug.* 749; *Proctor v. Hodgson*, 10 Ex. 824; *Bennett v. Reeve*, *Willes* 232; *Bullard v. Harrison*, 4 M. & S. 387; *Dodd v. Burchell*, 1 H. & C. 122, per *Wilde B.*; 2 *Wms. Saund.* 323, note 6, *Add. T.*, 2nd ed., 249.

C. Robinson. *Q. C.*, contra, cited *Chitty on Pleading*, 7th ed., Vol. III., p. 385; *Bullen and Leake, Prec.*, 2nd ed., 685, note *a*; *Gale on Easements*, 3rd ed., 443; *Add. T.*, 2nd ed., 260; *Woolrych on Ways*, 2nd ed., 78; *Angell on Highways*, secs. 5–7, 353–5; *Burn's Justice*, 29th ed., Vol. III., p. 509; *Bl. Com.*, Vol. II., p. 36; *Kent's Com.*, 11th

ed., Vol. III., p. 424; *Absor v. French*, 2 Shower 28; *Campbell v. Race*, 7 Cush. 408, 414; *Williams v. Safford*, 7 Barb. 309.

HAGARTY, J., delivered the judgment of the Court.

The last objection may be disposed of, we think, by noticing that only one breaking and entering at one time is charged in the declaration, and no question of excess, or of anything stated in aggravation, necessarily arises.

As to the third objection, it may be replied that the plea claims no right continually to deviate or trespass. It only points to the time when, &c., charged by plaintiff.

The second objection raises the broad question.

Lord Mansfield says in *Taylor v. Whitehead*, (Doug. 749), "Highways are for the public service, and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line."

The usual question that arose in most of the cases was whether, in the case of private ways which had become "founderous," or impassable, there could be a deviation through the adjoining land, and in the case just cited the distinction is pointed out, but no one seems to have questioned the right to deviate in the case of a founderous highway.

In *Woolrych* on Ways, 2nd ed., p. 78, the law is fully discussed. "With respect to a highway, it seems to be quite clear, that if there be any obstruction, the passengers may go over the adjoining land. * * If the ordinary track be so dangerous as to compel them to leave the road, they may go *extra viam*, passing as near to the original way as possible."

The law as laid down in Com. Dig. Tit. Chimin, and in 2 Black. Com., is reviewed, and considered to go too far in applying the rule to private ways.

In *Bullard v. Harrison*, (4 M. & S. 392) Lord Ellenborough recognizes the difference, and refers to Lord Mansfield's words already cited.

Woolrych adds: "It is now settled that the case in

Douglas is a sufficient and substantial authority for establishing the distinction between public and private ways."

Burn's Justice, 29th ed. Vol. III., p. 509: "If a *highway* be impassable from being out of repair, or otherwise, the public have a right to pass in another line, and for this purpose to go on the adjoining ground; and it makes no difference whether it be sown with grain or not," citing 1 Roll. Ab. 390 *a* pl. 1, and *b* pl. 1.

In *Angell* on Highways, sections 5 and 6, and sections 353, 354, 355, the law is fully considered and recognized, and the authorities, English and American, reviewed.

Chitty on Pleading, 7th ed., Vol. III., p. 385, gives a form of plea, setting out the facts with much prolixity, but in substance as in the plea before us:—that there was a highway: that the plaintiff's land adjoined: that the road was foundeours, and that defendant necessarily did a little break out of the highway, and a little trample, &c., the plaintiff's corn and grass, and spoil and cut a little the earth and soil, and necessarily a little cut and prostrated trees, &c., doing no unnecessary damage, &c., &c.

The plea before us alleges what this form does not; viz. "going no further from the said highway than was necessary, and returning thereto as soon as practicable."

The last edition of *Bullen and Leake* does not give the form, but states the substance, and refers to the authorities.

We think the plea is good against the objections taken, and defendant must have judgment.

Judgment for defendant.

CARRICK V. JOHNSTON.

Survey—Discrepancy between work on the ground and plan—Highway—Field notes—Costs.

The question in an action of trespass being whether there was a highway between lots 20 and 21 in a township, which the plaintiff denied, it appeared that the practice of surveyors in laying out a road allowance was to plant a post on each side of it, marked on the side nearest the road with the letter R., and on the opposite side with the number of the lot, and to plant a third post in the centre of the road, marked R. on two or on all four sides. Stakes thus marked were found between 19 and 20, but none between 20 and 21, and it was sworn that an original post had been seen there 24 years ago, and until within 3 or 4 years, marked 20 and 21, thus far shewing that there was no road allowance between those lots.

On the other hand, the registered map of the township, the map in the Crown Lands Department, and the field notes of the Surveyor who made the original survey, shewed such allowance. The plaintiff and defendant both claimed under grants from the Crown of separate parts of lot 21, described as commencing on the northern limit of such allowance, and without it the defendant would have no access to his land.

The jury were told that the work on the ground must govern, but that under C. S. U. C. ch. 54, sec. 313, the fact of the government Surveyor having laid out this road in his plan of the original survey, would make it a highway, unless there was evidence of his work on the ground clearly inconsistent with such plan. The jury having found for defendant—

Held, that the direction was right, but that the verdict was contrary to evidence, and a new trial was granted on payment of costs.

The Queen v. Great Western R. W. Co., 21 U. C. R. 555, remarked upon.

A certified copy of *part* of the field notes of the original survey is admissible in evidence.

The defendant's counsel told the jury that a verdict in favor of the plaintiff for any sum would carry costs. *Quære*, as to the right to make such statement; but *semble*, that the objections to a verdict for the plaintiff founded upon it, would apply equally to a verdict for defendant.

TRESPASS for entering the north-easterly and south-easterly parts of lot 21, on the Lake Shore, in the Township of Ashfield, cutting down trees and excavating the soil, with a suggestion that the trespasses were committed after notice not to trespass.

Pleas. 1. Not guilty. 2. Land not the plaintiff's. 3. As to so much as charges that the trespasses were committed after notice, a denial that they were so committed.

At the trial the defendant, by leave of the Court, further pleaded that there was a highway adjoining the plaintiff's land which was in places impassable, and that his necessary deviation in consequence was the alleged trespass.

Issue was taken on all the pleas, and the plaintiff (by

leave), demurred also to the last.—See the judgment on demurrer, ante p. 65, where the plea is set out at length.

The trial took place in October last at Goderich, before Hagarty, J.

The plaintiff's title to the east half of No. 21 was admitted. It appeared that there was a range of lots in Ashfield bounded on the west by Lake Huron, and on the east by a road running north and south, called the Lake Shore Road. The matter in dispute was whether there was a public highway between this lot 21 and lot 20, which was the next lot on the south.

The plaintiff called a Surveyor, who stated that the plan of survey of this township was to leave an allowance for road between every five lots; and it was proved that where an allowance for road was so laid out the practice was to plant a post on each side of it, and to mark the side of each post nearest such road with the letter R., and on the opposite side with the number of the lot, and to plant a third post to mark the centre of the road, generally marking an R. on two sides of it, sometimes on all four sides. Stakes thus marked were found between lots 19 and 20, but there was no proof that any posts so marked had been seen between 20 and 21. It was sworn that an original post had been seen twenty-four years ago, and till within three or four years, marked 20-21, so far shewing that there was no road allowance between these lots. The defendant lived on the south west quarter of this lot, between the plaintiff's land and Lake Huron. If there was no highway between lots 20 and 21 he could only get to the Lake Shore Road by crossing either the plaintiff's or some other person's land.

There was, in fact, a road between the Lake Shore Road and the lake to the north of lot 20. It was not shewn by what authority this was opened, nor precisely when it was first opened or used, perhaps five or six years ago. It could be passed with a team from the Lake Shore Road until near the defendant's land; thence it was in so bad a state that a deviation from its line was necessary, and the defendant did undeniably deviate on the plaintiff's land, and he cut two or

more trees of inconsiderable size growing thereon. The plaintiff proved service of a written notice upon defendant not to trespass on his land by cutting timber, &c. The trespasses complained of were committed after this notice had been served.

On the defence, it was proved that in 1860-1-2 and 3, the Council of the township assumed the existence of a highway between lots 20 and 21. In the first of those years they appointed a pathmaster for it, and in the same year resolved that the defendant's request with regard to surveying the road be granted, and that their Clerk should employ a Surveyor. In each of the other years they appointed a pathmaster for this road; and in pursuance of the resolution a Surveyor was employed and surveyed it, and planted stakes marking it out in 1860. He took for his guide the registered map of the township, and from it assumed that there was a road allowance there. This map corresponded with one produced on the trial by the Clerk of the Peace, certified on the 25th of July, 1842, by the then Surveyor General, on which was marked a road between lots 20 and 21 connecting the Lake and the Lake Shore Road, and nearly opposite to the west end of the road allowance between the 8th and 9th concessions. But this map contradicted the assertion that there was an allowance for road between every five lots of this lake or front concession; the next road north of this was between lots 28 and 29, and the next again north was between lots 37 and 38, and was obviously, according to the map, a protraction of the road between the 12th and 13th concessions. To the south, the nearest road to the one in dispute, according to the map, was between lots 12 and 13, and the next still further south was between lots 5 and 6.

A copy of part of Mr. Hawkins' plan of the Township was also produced, dated "Department of Crown Lands, Quebec, September, 1861," certified by the Assistant Commissioner, shewing the lots on the lake shore from 12 to 28 inclusive, and agreeing with regard to roads, so far as appeared, with the map last mentioned.

The defendant also put in an extract, dated September, 1861, certified by the Assistant Commissioner of Crown Lands from the field notes of Mr. Hawkins, by whom the first survey was made, in which was noted a reservation of one chain for a road between lots 12 and 13, between lots 20 and 21, and to the north of lot 28, where the extract ended.

A certified copy of the patent to the defendant was produced, and admitted by consent. The patent bore date the 29th of April, 1847, and granted to him the south west part of lot number 21 north of the town plot in the front concession of Ashfield, described as commencing at the water's edge of Lake Huron, *on the northern limit of the allowance for road between lots numbers 20 and 21.*

In reply the plaintiff put in an extract from Hawkins' field notes, certified on the 10th of July, 1860, which shewed that in noting his observations in surveying from number 18 across number 19, he entered "allowed one chain for road between No. 19 and No. 20," but these words were struck through with a pen, and the initials of Mr. Hawkins name, W. H., followed; and then at the end of his notes respecting No. 20, and before beginning No. 21, there was entered "allowed one chain for a road."

The learned Judge directed the jury that the established principle was that the work on the ground must govern in questions of this nature, but that under the 313th section of the Municipal Act, Consol. Stat. U. C. ch. 54, the fact of a Government Surveyor laying out allowances for road in the plan of the original survey of Crown Lands, would be sufficient to give to such roads the legal character of highways, though there might have been no stakes planted on the ground to mark them out, and they would be deemed in law highways before they were actually opened and used, and before statute labour and public money had been expended upon them, unless there was evidence from his work on the ground clearly inconsistent with the way he had laid it out on his plan.

The jury found for the defendant.

Robert A. Harrison obtained a rule *Nisi* for a new trial, the verdict being contrary to law and evidence and the weight of evidence, in this, that the plaintiff's title to the land was proved: that the work on the ground shewed no road between 20 and 21, and was inconsistent with the existence of such a road, and there was no evidence of any dedication or other creation of a highway: that if there was a highway, defendant had after notice trespassed beyond it; and because the defendant's counsel had improperly told the jury that a verdict for the plaintiff even for the lowest damages would inflict upon defendant the penalty of costs; and because the learned judge allowed a demurrable plea to be added without terms of any kind; or for receiving in evidence an extract not purporting to be a certified copy of the Surveyor's field notes; and in refusing to tell the jury that the mere fact of the road being continually out of repair, without shewing that the non-repair arose from accident, casualty or emergency, or that defendant had no other road, did not entitle defendant against the will of the plaintiff repeatedly to trespass on the plaintiff's land.

C. Robinson, Q. C., shewed cause, citing, as to the effect of the work on the ground, *Regina v. Great Western R. W. Co.*, 21 U. C. R. 555, 577; *Regina v. Hunt*, 16 C. P. 145, 158; *Ovens v. Davidson*, 10 C. P. 302; *Field v. Kemp*, 3 O. S. 374; *Perry v. Powell*, 8 U. C. R. 251; *Badgley v. Bender*, *Ib.* 321; *Miller v. Palmer*, *Ib.* 427; *Spalding v. Rogers*, 1 U. C. R. 269; *Regina v. Bishop of Huron*, 8 C. P. 258; *Richmond v. Ferris*, 6 C. P. 163; *Mountjoy v. The Queen*, 1 E. & A. Rep. 429. As to the statement with respect to costs, *Ch. Arch. Prac.* 11th ed. 1524; *Poole v. Whitcomb*, 12 C. B. N. S. 770; 2 U. C. L. J. 260; *Humberstone v. Henderson*, 3 P. R. 40; *Chilvers v. Greaves*, 6 Scott N. R. 359 (a). As to the reception of evidence, 23 Vic. ch. 22, sec. 30; *Badgley v. Bender*, 3 O. S. 321.

Robert A. Harrison, contra, cited *Helliwell v. Eastwood*,

(a), See also *Kelly v. Sherlock*, L. R. 1 Q. B. 691, 694, reported since the argument.

5 O. S. 104; *Wakelin v. Morris*, 2 F. & F. 26, 27, note *a*; *Dean v. Taylor*, 11 Ex. 68; *Bowyer v. Cook*, 4 C. B. 236.

DRAPER, C. J., delivered the judgment of the Court.

Some of the points stated in the rule may be readily disposed of. The plaintiff's title to the east half of No. 21 was admitted, but that left the question whether there was a highway *between* it and lot 20 untouched. If there was such a highway, then on the pleadings the verdict is right.

The judgment of the Court given last term against the demurrer (*ante* p. 65) answers the first point of alleged misdirection.

The alleged refusal to direct the jury as to the defendant's right to deviate from a highway being subject to certain limitations does not appear on the learned Judge's notes; the objection is not very clearly defined in the rule.

As to the objection to the address of the defendant's counsel to the jury; in *Poole v. Whitcomb* (12 C. B. N. S. 770), where a jury evidently found in favour of the plaintiff upon a statement of the plaintiff's counsel that damages to less than a stated amount would not carry costs, the Court granted a new trial. Looking at the reasons given for that decision, it appears to me they are equally applicable to a verdict for defendant grounded upon an analogous statement of his counsel, and that a verdict founded upon the effect which an opposite verdict would have upon the costs of the action, is as little defensible as a verdict for the plaintiff similarly obtained. In *Levi v. Milne* (4 Bing. 200) Park, J. was of opinion that a verdict given for defendant because a verdict for a shilling would carry costs, ought to be set aside; and if it be wrong that a plaintiff's counsel should bring that influence to bear upon the jury, I do not comprehend the reasoning which makes it right for a defendant's counsel to do so. I should prefer the conclusion that a jury may be properly told what the law is in regard to all matters affecting the case which they have to try, than to

uphold such a distinction. We are, however, enabled to dispose of this case, as *Levi v. Milne* was disposed of, without resting on so very unsatisfactory a basis.

The really important question is, was the evidence legally sufficient to establish the existence of a highway in the *locus in quo*. In order to answer this question the statutory provisions affecting it must be looked at.

The Consol. Stat. U. C. ch. 93, sec. 14, enacts, that all boundary lines of concessions, *all side-lines and limits of lots surveyed*, and all *posts* or monuments, marked, placed or planted at the front angles of any lots or parcels of land, under the authority of the Executive Government, shall be the *true and unalterable* boundaries of all such concessions, lots, or parcels of land, whether the same upon admeasurement be found to contain the exact width, or more or less than the exact width mentioned or expressed in any letters patent, grant or other instrument in respect of such concession, lot, or parcel of land. And (sec. 15) every concession, lot, or parcel of land, shall embrace the whole width contained between the front posts, monuments or boundaries, planted or placed at the front angles thereof respectively, so marked, placed or planted as aforesaid, and no more nor less, any quantity or measure expressed in the original grant or patent thereof notwithstanding. And (sec. 16) every patent, grant or instrument, purporting to be for any aliquot part of a lot, shall be construed to be a grant of such aliquot part of the quantity the same (*i. e.* the lot) may contain, whether such quantity be more or less than that expressed in such patent, grant or instrument.

These provisions are too plainly expressed, and have too often been the subject of judicial construction, to admit of doubt in their application. If the Crown grants a lot or an aliquot part of a lot, without specifying the quantity or describing it by bounds, whatever is contained between the front posts planted in the original survey back to the rear will pass as the whole lot, and any aliquot part must be taken in due proportion out of the whole so ascertained. If the grant contains a statement of the number of acres, with

or without a description by boundaries, the same rule must govern, whatever be the quantity expressed in the grant; and if the grant is to be controlled, restricted or expanded by the actual survey, *a fortiori*, as it appears to us, must be the maps, plans, field notes, or reports of the Surveyor, for these are but representations of what has been done upon the ground, and remains there recorded by posts or monuments planted, and by lines run and marked by blazed trees or otherwise. A contrary decision would place such maps, &c., above a grant under the great seal.

The grant under which the plaintiff derives title in this case, though not produced at the trial, has been brought before us. It is dated the 29th of April, 1847, and grants 143 acres of land, composed of the north and east part of lot number 21, north of the town plot in the front concession of Ashfield, commencing in the northern limit of the allowance for road between lots 20 or 21, at the distance of 49 chains, on a course S. $82^{\circ} 43'$ E. from Lake Huron; then N. $4^{\circ} 10'$ W. 10 chains, more or less, to the centre of the lot; then N. $82^{\circ} 43'$ W. 51 chains, more or less, to Lake Huron; then northerly along the water's edge to the limit between lots numbers 21 and 22; then S. $82^{\circ} 43'$ E. 101 chains, more or less, to the allowance for road in rear of the said lot; then S. $4^{\circ} 10'$ E. 20 chains, more or less, to the aforesaid allowance for road between lots numbers 20 and 21; then N. $82^{\circ} 43'$ W. 47 chains 60 links, more or less, to the place of beginning.

Comparing this grant with that made to the defendant, we think the two were designed to cover the whole Lot No. 21. Either of the grantees to ascertain his portion must first have sought for an allowance for road between Nos. 20 and 21, and according to the evidence would have found no trace whatever of such a road, but he would have found a post marked 20-21, indicating that these two lots immediately joined each other, that a boundary line, not an allowance for road, divided them, and he must have adopted this line as his guide for following out the rest of the description. It is plain to us that the description was framed upon an office plan on

which such an allowance for road was marked, and it is equally plain that no such road was laid out; no stakes were planted or marked to indicate its existence on the ground. There is no conflict of evidence as to this. There is only the proof the stake marked 21 on the north side, 20 on the south. The Patent does not profess to grant or to describe a lot including or out of which was to be taken the road allowance. The whole of No. 21 is granted, and the work on the ground shews that No. 21 extends to No. 20.

It was, however, suggested that according to the case of *Regina v. The Great Western Railway Company*, (21 U. C. R. 555) the plan returned by the Surveyor, shewing an allowance for road between Nos. 20 and 21, (especially as it was acted upon in the Crown Lands office) establishes a highway between those lots, and that this has been recently considered in the Court of Common Pleas as well decided.—*Regina v. Hunt*, (16 C. P. 145.) If that case decided that the Surveyor's plan so returned could vary or annul his actual field work as finally completed, I should respectfully decline to follow it, as in my humble judgment it would be opposed to the principle of the Statute and of the decisions construing its provisions. The decision does not, however, go that length, nor do we imagine it was ever so intended. The learned Chief Justice (Sir John Robinson, and no Judge better understood the question,) said that under the Municipal Act s. 313, "The fact of a Government Surveyor laying out certain allowances for roads in the plan of the original survey of Crown lands would be sufficient, we think, to give to such roads or streets the legal character of highways, *though there may have been no stakes planted on the ground* to mark them out." This language assumes that the making the plan was preceded by an actual survey of the ground; and the evidence of the Surveyor (p. 559) shews that he had laid out the two streets which were in question as extending from a street called Front street to the River St. Clair; that when he made his survey he did not *plant any stakes* at the water's edge, (p. 565) upon which the learned Chief Justice at the

trial specially remarked, (p. 567) ; and again (p. 575) he states the result of the Surveyor's evidence, that he, in making the survey, marked upon the plan two short streets intended to lead from Front street to the water, " but he did not actually lay them out upon the ground ; *that is, he planted no stakes west of Front street to mark such streets.*"

On examining the facts of that case, which are fully reported, it appears that the Surveyor was dividing into town lots, to form an addition to the town of Sarnia, a piece of land surrendered by the Indians to the Crown. He laid out several blocks of town lots, and no dispute arose that the two streets on which these lots were surveyed, and which formed one of their respective boundaries, were sufficiently designated on the survey, but between Front street and the River St. Clair no such lots were laid out, and on the ground no stakes were planted to designate the width of the street. The distance to the river from Front street, protracting the line of one street, was one chain and fifty links, and fifty-seven links on a protraction of the line of the other. The Court decided, as we understand the case, that though there were no stakes planted at the water's edge, nor yet west of Front street, yet that the survey and division into lots bounded respectively on these streets, east of Front street, shewed by the work on the ground what the intention of the survey was, and that the marking out on the plan of survey the protraction of such streets to the river gave to the portions protracted the legal character of highways. But to treat that decision as an authority that a Surveyor, by marking a road on a plan as laid out in a place where he did not in fact lay one out, and where his work on the ground negatives that any road was laid out or was meant to be laid out, and still more, where if it had been laid out it would apparently have been a departure from the general plan of survey of the particular locality, is to my apprehension a perversion of its meaning ; and the learned Judge, in directing the Jury in the present case, qualifies, (and I entirely agree in the qualification) the language used in *Regina v. Great Western*

Railway Company, by adding to this effect, unless there be evidence from his work on the ground clearly inconsistent with the way he has laid it out on his plan.

The defendant gave no other evidence sufficient to establish a highway over the *locus in quo*. I agree with the learned Judge in the opinion he expressed at the trial that there was no proof of a highway by dedication.

We do not think that section 313 of the former Municipal Act, or section 315 of chapter 51 of last session, affect the question, for we do not hold that this was an allowance for road made by the Crown Surveyor, what he is proved to have done being adverse to that conclusion.

There remains the question of the propriety of admitting as evidence extracts of part of the field notes of the original survey. The objection, as stated in the rule, is not wholly in accordance with the facts, for the extracts appear to be certified by the proper officer. Taking together the Consol. Stat. C., ch. 80, s. 5, the 23 Vict., ch. 2, s. 30, and the Consol. Stat. U. C., ch. 32, s. 6, we think such extract admissible. It has, we believe, been the practice of all the Judges to admit them, and we are not prepared to adopt a construction which would compel parties to procure a certified copy of the field notes of a whole township in order to prove what is noted therein as to a single lot, any more than to require a certified copy of a map of a whole township when a mere fraction of a lot or part of a concession line is in question.

This is certainly a hard case upon the defendant. He has purchased forty acres of land on the lake shore, bounded, according to the Surveyor's map, to a copy of which he very probably may have had access, on the southern side by an allowance for road between his land and the adjoining lot, and which road led to the Lake Shore Road, along or from which he could travel in any direction he desired. The mistake or carelessness of the Crown Surveyor, in marking this road on his plan when he had made no reservation for it on the ground, has subjected the defendant to this action, besides leaving him no right to cross the land of others to get

to the nearest highway, except that derived from necessity. He cannot compel the municipality to open and give a legal character to the supposed road, and they, perhaps, could not do it without compensating the plaintiff for the land he had taken, nor do we suppose that he can enforce compensation from the Crown for the error in the plan made by their Surveyor. But the clearest sense of this hardship must not interfere with our adjudication upon the legal rights brought before us. We think the evidence did not establish a legal highway between these lots 20 and 21.

There must be a new trial, and as there is no misdirection, in our opinion it should be on payment of costs.

Rule absolute on payment of costs. (a)

DUNCAN MARTIN V. JAMES HANNING.

Deed—Alteration—Estoppel.

A person who has executed a deed cannot be bound by an alteration made in his absence by his verbal direction.

Defendant having executed a bond conditioned for one H. performing an award, one of the referees refused to act, and another was proposed, to which defendant assented. The papers were sent to defendant's attorney to be changed, and the bond was altered but not re-executed. Defendant was made aware of the alteration, and attended with H. before the arbitrators, where he took an active part. The jury were told that if defendant verbally assented to the alteration being made by his attorney he was bound, though he was not present and had not re-executed.

Held a misdirection.

Quære, whether upon the evidence, more fully stated below, defendant could be held estopped by his acts from disputing the bond so altered.

To bind a person to a deed altered out of his presence, and by his verbal directions only, the acts done should be unequivocal and consistent only with his positive assent. Here the arbitration could have been carried out without his being bound, and his attendance there was not as a principal.

APPEAL from the County Court of Wellington.

Declaration on a bond by defendant, conditioned for one Peter Hanning performing an award to be made by Andrew Little and George Martin, in a matter in difference between the plaintiff and Peter Hanning, as set out in a deed of submis-

(a) This judgment was given in Hilary Term, 1867, but is reported here as connected with the previous decision on demurrer.

sion of even date with the bond. An award was alleged to have been made, and breaches were assigned of Peter's non-performance.

Plea, non est factum.

At the trial it appeared that after the bonds and deeds had been executed, one of the referees, one Leslie, refused to act, and Little was proposed in his stead. It was suggested that a person present should at once alter the writings by inserting Little's name, but defendant, while he agreed to accept Little, said the paper must be sent to Guelph to his attorney to be changed. His son and the plaintiff accordingly took them to Guelph. The attorney, Mr. McCurry, did make the necessary alterations; the deed of submission was re-executed by the parties in his presence, and the defendant's bond and that of John Martin, the plaintiff's surety, were altered and taken away from Guelph. The attorney thought, as he said, that these bonds were to be re-executed, and struck out the former date, thinking a new one would be put in.

A witness swore that after the alterations were made, the parties met—the plaintiff, defendant, and Peter Hanning his son, and the referees. Before it commenced defendant asked witness when they were going on. Witness told him that the bonds were returned, and that they were changed, that Little's name was put in instead of Leslie's. He said that was all right, that he did not want a better man than Little. The attorney who made the alterations personally conducted the arbitration on Peter Hanning's side. Defendant took an active part in the case, interrupting the plaintiff's counsel and consulting with McCurry, who said, however, that he was instructed by Peter Hanning. Plaintiff's surety, George Martin, said he gave authority to have the name changed in his bond, but he never re-executed it.

Peter Hanning swore that when McCurry was making the alterations, he and the plaintiff agreed that there need be no securities, and that was why they did not go to get the altered bonds re-executed.

The jury were told that if defendant gave instructions to

his son and the plaintiff to go to McCurry, and that he was to act as he thought proper as his agent, that would not be sufficient authority to him to make the alteration so as to bind defendant; but if they found that the instructions to McCurry were not carried out by him so as to render the bond in its altered state a complete instrument to bind defendant, their verdict should be for him, as the alteration for the purpose of binding defendant must be done either by defendant himself or the person authorized by him to make the alterations: that a verbal consent to have the bond altered by a particular party in a particular way, was sufficient, and that it was for them to say, looking at the whole evidence, if that assent had been proved in this case, and if this alteration had been made in accordance with it.

The jury found for the plaintiff, leave having been reserved to move to enter a non-suit. A rule *nisi* obtained for that purpose was afterwards discharged, and the defendant appealed.

McMichael, for the appellant, cited *Hibblewhite v. McMorine*, 6 M. & W. 200; *Markham v. Gonaston*, Cro. Eliz. 626.

Crooks, Q.C., contra, cited *Broom Max.* 1st Ed. 145, 147; *Montreal Bank v. Baker*, 9 Chy. Rep. U. C. 97; *Masters v. Miller*, 1 Sm. L. C., 5th Ed., 776; *Swan v. The North British Australasian Company*, 7 H. & N. 603; S. C. In Error, 2 H. & C. 175; *Ex Parte Swan*, 7 C. B. N. S. 429; 10 Jur. N. S. p. 40, Leading Article.

HAGARTY, J., delivered the judgment of the Court.

The learned Judge, in his very careful judgment, after reviewing the evidence and the law, notices McCurry's strong evidence, and remarks that but for the evidence that defendant confirmed the bond after the alteration when informed that they had been returned, the defendant would, perhaps, have been entitled to set aside the verdict on the law and evidence, but that the acknowledgment of the bond after the alterations by McCurry deprived him of the right to take advan-

tage of that incomplete act under the instructions to him. He therefore discharges the rule for a new trial. He states that the jury, in finding for the plaintiff, must have considered that when the bond was altered the defendant considered it complete and binding, having confirmed it by his admissions when told that it was changed.

The case does not seem to have been left to the jury as depending on any subsequent confirmation of the bond in its altered state by defendant, or on any estoppel in pais by defendant's acting at the arbitration as if the bond was altered with his authority, and treated as binding on him. It seems to have turned more on their view of the evidence as to whether defendant authorized McCurry to make the alterations or not, and they were told that a verbal consent to have the bond altered by a particular party in a particular way was sufficient.

We are very reluctant to interfere in this case, as the merits are probably in accordance with the verdict and the judgment below. The principle involved is one of the very highest importance, requiring the most serious consideration.

The argument before us for the plaintiff was chiefly as to defendant's subsequent conduct precluding him from denying his liability on the altered bond, and no doubt this was the strongest point in the plaintiff's favour. It did not, however, as far as we can see, go to the jury on that point, and we hesitate to assent to the direction that a verbal assent to have the bond altered by a particular person in a particular way, was sufficient.

If defendant had been present, and desired another to make the alteration, which was accordingly then made, this might be considered as his own act, as if done with his own hand. But can a person who has executed a deed send word to another person at a distance to make some alteration in it, which alteration is accordingly made in his absence by such person? We have seen no authority warranting such a position. It seems subversive of the principle that authority to bind by deed must be given by deed, and would open the door to most dangerous consequences from

evidence of alleged verbal directions and assents. In this way a conveyance of land might be altered in a vital part, enlarging or cutting down an estate, without writing under the Statute of Frauds.

The much debated doctrine of estoppel in pais by subsequent acts done by the executing party representing in fact to others that the altered deed is his deed, and thereby inducing them to change their position, is of a wholly different character. Had the case gone to the jury on a direction as to this doctrine, and the jury had found for the plaintiff thereupon, we should have had to consider the effect of many authorities not easily to be reconciled, and not presenting a very clear rule of decision.

We should desire to have the jury's attention especially directed to the evidence of one of defendant's witnesses, that the parties were willing to dispense with having any securities, and then to be asked if defendant made the alleged statement when he heard of the bond having been altered, and interfered and took part in the reference, especially leading the plaintiff to enter into and consent thereto, under the belief that he, defendant, had assented to and was bound by his bond in its altered state, or, in other words, that he was bound to any award to be made by Little as he was previously bound to an award made by Leslie.

We think the jury should be further told, that if the defendant was merely acting in the reference as interested on behalf of his son, Peter, and that his remark to Martin, if made, might only possibly refer to his agreeing to the dispute between plaintiff and his son being left to Little instead of Leslie, that such acts and remarks would not bind him after the alteration in his bond: that to bind a party to a deed altered out of his presence, and only by verbal directions, the acts done should be quite unequivocal, and consistent only with his positive assent: that if he had been the chief party in the reference, his conduct in taking part in it would be of the strongest kind to shew his assent, but his part was collateral, and the reference might be fully carried out without his being bound by his bond.

If the jury, on such a direction, found for the plaintiff, we should then have to decide how far on the authorities the defendant is bound.

We think the case must be submitted to another jury, and the rule below for a new trial be made absolute without costs.

Appeal allowed.

WILSON V. BIGGAR.

Covenant for Title—Dower—Encumbrance.

Declaration on defendant's covenant to convey certain land to plaintiff, free from encumbrances, assigning as a breach that the land was, at the date of the covenant, subject to a claim for dower in favor of one R., the wife of one J., a former owner of said land, the said R. never having released her right to dower therein.

Held, bad on demurrer, for it could not be assumed that J. was dead at the date of the covenant, and the inchoate right to dower would not be an encumbrance within the covenant.

Thornhill v. Jones, 12 U. C. R. 231, and *Dack v. Currie*, *Ib.* 334, followed.

DECLARATION, that the defendant by deed, &c., covenanted that he had a right to convey certain land to the plaintiff, free and clear from all encumbrances whatsoever, and that the said land was free from all encumbrances; yet the defendant had not such right to convey the said lot of land in the manner above-mentioned, and the said lands were not, at the date of said Indenture nor since, free from all encumbrances, the said lot of land being at the date of said Indenture subject to a claim for dower in favor of one Ruth Barnes, the wife of one John Barnes, a former owner of said lot of land, the said Ruth Barnes never having released her right to dower in said lands.

Demurrer, that no breach of the covenant is shewn.

Appelbee, for the demurrer, cited *Thornhill v. Jones*, 12 U. C. R. 231; *Dack v. Currie*, 12 U. C. R. 334; *Hoyt v. Widderfield*, 5 U. C. R. 180.

J. A. Boyd, contra, cited *Rawle on Covenants for Title*, 3d. Ed. 119-125; *Lampet's Case*, 10 Co. 52. (a).

HAGARTY, J., delivered the judgment of the Court.

On this declaration we cannot, we think, assume that John Barnes was dead when the covenant was made, or that Ruth's claim was then, or even now, more than an inchoate right to dower. It does not allege that her dower was an actual or existing charge, but merely that the land was "subject to a claim for dower."

In *Thornhill v. Jones* (12 U. C. R. 231) the covenant was that the grantor was lawfully seized of a good, sure, indefeasible, &c., estate in fee simple, without any reservation, &c., or any other matter or thing to alter, change, charge or encumber, &c., and that the plaintiff should enjoy without interruption of the grantor, &c., or any other person, acquitted and discharged of all manner of encumbrances. Breach, the prospective claim of dower of covenantor's wife. The law is fully reviewed by the late Chief Justice of this Court, and it was held that the possible claim of the wife to dower, depending on the contingency of her surviving her husband, did not form an actual present encumbrance so long as the husband lived.

Dack v. Currie (12 U. C. R. 334), confirms and follows the preceding case, the covenant there being stronger in its terms than that before us, charging, as here, the existence of a claim for dower in the wife of a former owner, who, though living at the date of the covenant, subsequently died, and the covenantee had to pay money to obtain a release of dower from her.

The Court arrested the judgment, adhering to *Thornhill v. Jones*. Burns, J., says "When I use the expression 'claim for dower,' I mean an inchoate contingent right. It appears to me such a claim is not within the meaning of the covenants declared upon in this case."

We think the case before us falls within the principle of these two decisions. If there be any distinction, it is one too thin to induce us to hesitate in following some leading rule of decision in matters of such frequent occurrence in this country.

If the plaintiff be dissatisfied, he must apply to a higher Court to review the law above laid down, and settle it on some certain basis.

Judgment for defendant.

MAGRATH V. TODD.

Discharge of Mortgage—Defective affidavit—Registry, C. S. U C., ch. 89, sec. 59—Assignment of lease—Liability of assignee.

The Registrar having recorded a certificate of discharge, upon an affidavit which did not state the place of execution, as required by the Statute,—*Held*, that though he should properly have refused to register it, yet being registered it was effectual as a reconveyance of the legal estate to the mortgagor.

Robson v. Waddell, 24 U. C. R. 574, distinguished, on the ground that there the defect was patent on the face of the Registry book where the memorial was copied.

One M., being the original lessee, assigned to P., who did not execute the assignment, but assigned to defendant by mortgage, reciting it. Afterwards, on a decree in a foreclosure suit brought on this mortgage, the land was sold to M. as the highest bidder, who entered into possession, but paid nothing and received no conveyance, nor was any order made vesting the property in him.—*Held*, that defendant became liable on the covenants in the lease, under his assignment from P., and continued so notwithstanding the sale.

In this case, at the Winter Assizes of 1866 for York and Peel, before Hagarty, J., a verdict was taken for the plaintiff for \$1488.50, subject to the opinion of the Court upon a case stated, of which the material facts were as follow :

This action is brought to recover rent due upon premises leased by Robert Stanton to Charles March, by Indenture dated 29th February, 1844, *habendum* for 21 years from the 1st March, 1844. Rent is claimed from the defendant from the 8th February, 1852, to the expiration of the term on the 1st March, 1865.

The facts of the case up to the commencement of the action of *Jones v. Todd*, are fully reported in 22 U. C. R. 37. A second action was brought, in which Cameron, as mortgagee in fee of the former plaintiff, Jones, was plaintiff against the now defendant, and the plaintiff Cameron recovered, a verdict having been taken for the plaintiff subject to the opinion of the Court. The case is reported in the same volume of Q. B.

Reports, 390. The verdict was upheld, and the judgment of the Queen's Bench approved on appeal, (2 E. & A. Rep. 434).

Since the bringing of that action, on the 31st of August, 1861, Cameron executed a certificate in due form, under the Registry Act, stating that all money due to him upon the mortgage of 27th July, 1853, made to him by E. C. Jones and Margaret his wife, was satisfied. This was witnessed by two persons, who subscribed their names thereto, their additions and places of residence being written adjoining each respective signature.

On the 2nd of September, 1861, one of these witnesses made oath that he was present and saw the same certificate duly executed by Cameron, and that he was one of the subscribing witnesses thereto—*not stating where it was executed*. The Registrar made a memorandum on the certificate as follows: "Recorded 2nd September, 1861, at 3 p. m., in Lib. 87, fol. 585," and signed the same.

On the 8th of February, 1862, by Indenture of that date, and duly registered, the said E. C. Jones and Margaret his wife, (as to dower), in consideration of £637 2s., granted, bargained, sold, &c., the same land, &c., to the plaintiff, his heirs and assigns, *habendum* to and to the use of the plaintiff, his heirs and assigns, subject to a proviso for redemption, with the usual covenants for payment and title.

The declaration (*mutatis mutandis*) was in the same form as in the former action. The same with two additional pleas were pleaded. One, that before the alleged breaches of covenant, Jones had by deed granted and conveyed all his reversion and estate in the demised premises alleged to have been granted to him by Robert Stanton to Cameron, and that Jones ceased to have any reversion in the said premises. The other, that before any of the breaches, the term, estate and interest of the defendant, was sold by order and decree of the Court of Chancery, and such term, estate, and interest, was by such sale vested in March, as purchaser thereof, and the defendant after that sale ceased to have,

and thenceforth had not any estate or interest in the demised premises.

As to this plea, the facts were that on the 1st of October, 1861, an order was made in a foreclosure suit brought upon the mortgage made by Philpotts to the defendant, of the term for 21 years originally granted by Stanton to March, whereby the interest of March, (if any) in the premises, as well as in other lands mortgaged to defendant, was directed to be sold, and on the 10th of May, 1862, these lands were sold, and March was the highest bidder for these premises, and immediately after went into possession of part, and received the rents payable for the other part, having all along been in the receipt of the same, and he had since continued in such possession. The defendant never had been in possession. By a report of the Master, made on the 2nd September, 1862, and afterwards confirmed, March was declared the purchaser, but he had paid no part of the purchase money, no conveyance to him had been executed, and no order vesting the property in him had been made.

The other plea raised the question of the sufficiency of the certificate of payment of the money secured by the mortgage Jones to Cameron, and of its registration, to make it operate under the registry law as a reconveyance to Jones of the mortgaged estate. If not a reconveyance, Jones had no legal estate to convey to the present plaintiff.

Herbert Jones, for the plaintiff, cited *Dwarris* on Statutes, 634.

Crooks, Q. C., for defendant, cited *Robson v. Waddell*, 24 U. C. R. 574; *Burnett v. Lynch*, 5 B. & C. 589; *Broom* Leg. Max. 80, 523; *Powell* on Mortgages, 182, 183; *Norval v. Pascoe*, 10 Jur. N. S. 792; *Cox v. Bishop*, 3 Jur. N. S. 499.

DRAPER, C. J., delivered the judgment of the Court.

The first, second and third points taken for the defendant are in effect determined against him in the case of

Cameron v. Todd (22 U. C. R. 390). (a) Though not a party to giving that judgment, I was in the Court of Appeal which confirmed it, (2 E. & A. Rep. 434).

The question whether the plaintiff is assignee in law of the reversion of Stanton, depends upon the effect of the certificate of payment of the 31st August, 1861, and the registration thereof as stated.

We have arrived at the conclusion that the certificate so registered did operate as a reconveyance. The Registry Act Consol. Stat. U. C., ch. 89, sec. 59, expressly declares that every such certificate of payment by the mortgagor, his heirs, &c., at whatever time given, and whether before or after the time limited by the mortgage, shall, *when so registered*, be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs &c., of the original estate of the mortgagor.

The indispensable and effective parts to produce the reconveyance are, payment, the execution by the mortgagee of such a certificate of payment as the Statute requires, and registration of that certificate. In these three things no defect has been suggested. As to the first, it is established by proof of the written acknowledgment of the party entitled to the money; the second is regular in form; and so, taken *per se*, is the registration. But the affidavit upon which the registrar has received and entered this certificate—in other words, has registered—is objected to because it does not contain what the Statute requires, for it omits to state at what place the certificate was made or executed. In fact this defect exists.

We have no doubt that this defect would have justified the Registrar in refusing to enter the certificate, and that in registering it without an affidavit such as the Statute requires,

(a) These points were, that defendant was not liable,—1. Because he is not the assignee in law of the alleged reversion of said Robert Stanton.—2. That said alleged reversion was merged and destroyed in the inheritance thereof, and ceased to exist by force of and under the proceedings in Chancery, brought by Alexander Patterson, for the foreclosure of said mortgage, from the said Robert Stanton to Hugh Carfrae, and the Indenture of the 27th February, 1853. 3. The defendant is not such assignee in law of the term referred to in the declaration as renders him liable to the plaintiff for the breaches of covenant in the declaration mentioned.

he failed in the strict and proper discharge of his duty. But on a consideration of all the facts before the Court, especially considering what the omission is, we are not prepared to hold that this certificate is inoperative. We think, on the contrary, we may say the act of the Registrar in receiving and entering it, *fieri non debuit, sed factum valuit* (5 Co. 886). It seems to us a less evil to uphold such an act of the Registrar, though irregular, than to impose upon every subsequent purchaser or incumbrancer of a property that has been mortgaged, not only to search and ascertain all that has been entered upon the registry books in reference thereto, but to examine the memorials or other instruments entered and registered, and the formal sufficiency of the proof upon which the Registrar has acted.

In arriving at this conclusion, we have not forgotten the recent decision of *Robson v. Waddell* (24 U. C. R. 574). We distinguish it on the ground that the objection was patent on the face of the Registry book, in which was copied the defective memorial, and was discoverable by any one who searched the book and examined the entry. In the present case, on the face of the entry there was no defect, and we think the obligation to search does not extend further where this is the case. It might be held that a defect in the entry of a memorial in the Registry book was not an insuperable difficulty, if no defect was found to exist in the memorial itself, which is filed in the Registry office, and if this be so, then on the part of the defendant it might be further urged that there is little difference between going behind the entry in the Registrar's book in order to make good a registration or to avoid one, and that a title upheld under such circumstances would probably defeat a subsequent purchaser who relied upon the defect. That may be so, but it would not strengthen the defendant's argument, for his position in respect to these premises is the same, whether one party or the other has the legal fee. The error of the Registrar causes him no injury, and charges him with no additional liability.

The other question appears to be, whether, under the ninth

plea and the facts admitted in reference thereto, the defendant is to be held to be the assignee of the lessee's (March's) covenant, and as such liable to the assignee of the lessor, by virtue of the privity of estate, for the non-payment of rent. The judgment referred to decides the question to this extent, that the defendant, on the facts formerly admitted, was mortgagee of the entire interest in the term, and liable without entry. It was not stated, however, in that case, that Philpotts, who obtained the assignment of the term from March, the original lessee, did not execute that assignment. It appears, however, that Philpotts afterwards assigned these premises to the defendant, by way of mortgage of the residue of the term, by a deed which recited that March had duly conveyed and assigned to him. But for the defendant it is urged that, admitting that he became liable in the first instance, his liability ceased when under the order made in his foreclosure suit, brought upon the mortgage from Philpotts, these premises were sold, and March was the highest bidder, and entered into possession, although March has paid nothing, no conveyance to him has been executed, and no order vesting the property in him has been made. As was pointed out in the argument, this contention amounts to this, that an auction sale of a term, followed by neither payment or conveyance, will pass the term to the highest bidder, and subject him, as the assignee, to perform covenants to pay rent, &c., &c., which run with the estate.

Every argument which was urged on the defendant's part, that Philpotts had not executed the assignment from March to himself, must apply with increased force to the position of March, who as to this alleged purchase stands on the same footing as a stranger to the earlier proceedings.

The settled principle of law is, that an assignee of a whole term is subject to the covenants in the original lease, while the doctrine of Equity appears clearly settled, that until an assignment is actually executed, parties who had contracted with the original lessee for an assignment, and so were equitable assignees, and on the faith of the contract had entered into possession and enjoyment, are not liable to the lessor on

the lessee's covenants for rent accruing due or for breaches of covenant committed while they were in possession. *Cox v. Bishop*, (3 Jur. N. S. 499) and the cases therein referred to, apparently establish this. Now, March's position is clearly not that of a legal assignee.

In *Burnett v. Lynch*, (5 B. & C. 589,) which is recognized and acted upon in *Walker v. Bartlett*, (18 C. B. 845), and *Mathew v. Blackmore*, (1 H. & N. 766), the assignment of the term was by deed poll made by the executors of the lessee, and the assignee entered and afterwards assigned. In our case the lessee assigned, and as Philpotts did not execute the assignment, his position is like that of the assignee in *Burnett v. Lynch*. But in his deed of the 17th August, 1853, he assigns these premises to the defendant, describing them as those leased by Stanton to March, and duly conveyed and assigned by March to himself. After this it could not be open to him to contend, against the principle of the cases above referred to, that he was not liable to the covenants contained in the lease. The assignee who takes the estate is, we apprehend, by his acceptance of the assignment, though he has not executed it, subject to and bound to perform the lessee's covenants which are annexed to the estate, and he may even be sued upon them before he has taken actual possession—*Stone v. Evans*, (Pea. Add. Cas. 94.) As the term was clearly vested in the defendant by way of mortgage, which it appears he has foreclosed, we think there is no doubt he was liable to the covenant to pay the rent.

The plaintiff is, therefore, in our opinion, entitled to the amount of the verdict, and the postea should be delivered to him.

Postea to Plaintiff.

GRIFFITH V. HALL.

Malicious Arrest—Pleading.

A declaration for malicious arrest alleged that at the time of making the affidavit, procuring the Judge's order, issuing the *capias*, and arresting the plaintiff, defendant had no reasonable or probable cause for believing that the plaintiff was about to quit Canada with intent to defraud defendant of the debt, or with any fraudulent intent, yet he falsely and maliciously, and without any reasonable or probable cause, made oath that he verily believed the plaintiff was about, &c., and by means of such false allegations falsely and maliciously induced the Judge to grant the order, and caused the plaintiff's arrest.

Held sufficient: that it was unnecessary to shew the order set aside, or to aver that the affidavit shewed facts and circumstances to satisfy the Judge, the real cause of action being that defendant by his false and malicious statements set the law in motion.

Defendant in his plea stated what allegations the affidavit contained, (not averring their truth) and that they satisfied the Judge, who thereupon granted the order.

Held, clearly no defence.

DECLARATION.—The first count alleged that the defendant maliciously, and without reasonable or probable cause, procured from the County Court Judge of Peterborough a special order directing the now plaintiff to be held to bail at defendant's suit for \$125.25, by then falsely and maliciously representing to the said Judge, by a false affidavit, that the now plaintiff was justly and truly indebted to him, the defendant, in \$125.25; and in pursuance of the said order caused a writ of *capias* to be sued out, and endorsed for bail for \$125.25, and caused the plaintiff to be arrested by virtue of the said writ, and to be detained, &c. : that the now defendant obtained a verdict in the action against the now plaintiff for \$56 only, this being a sum of money for which the said defendant could not lawfully cause the said plaintiff to be arrested, and afterwards, in the next term of the said County Court, it was ordered that the now defendant should not tax any costs in said action against the now plaintiff, and that the now plaintiff should be allowed to tax his costs and set off the amount thereof against said verdict, and afterwards the now defendant obtained final judgment against the now plaintiff in such suit for £4 16s. 7d., whereby the said action was determined.

Second Count—That at the time of the making of the affidavit, procuring the Judge's order, issuing of the *capias*, and arresting of the plaintiff thereunder, as in the said first count and hereinafter complained of, or at any one or more of such time or times, the defendant had not any reasonable or probable cause for believing that the now plaintiff was, unless forthwith apprehended, about to quit Canada, with intent to defraud the defendant of the said debt in the said affidavit mentioned, or with any fraudulent intent whatever; yet in the affidavit in the said first count mentioned the defendant further falsely and maliciously, and without any such reasonable or probable cause as aforesaid, made oath and swore that he verily believed that the now plaintiff, unless forthwith apprehended, was about to quit Canada with intent to defraud him of the said debt in the said affidavit mentioned, and thereby and by means of such false allegations falsely and maliciously induced the Judge, in the said first count mentioned, to grant the said order therein mentioned, and further falsely and maliciously, and without any such reasonable and probable cause as aforesaid, caused the said *capias* to be issued, and the now plaintiff to be arrested and imprisoned, as in the said first count complained of; and the plaintiff avers that the said action in the said County Court was afterwards finally determined and put an end to, in the manner and form in the said first count mentioned.

Plea to the second count—That the affidavit on which the said defendant obtained the said Judge's order in the said Court mentioned, contains the following allegations, to wit: First, that the now plaintiff was justly and truly indebted to the now defendant in \$125.25, being balance due to the now defendant from the now plaintiff for his use by the now defendant's permission of a dwelling house and premises, with the appurtenances, of the now defendant, in the town of Peterborough. Second, that the now plaintiff had been for some time in the United States of America, and had only just returned therefrom to the said town of Peterborough. Third, that the now plaintiff told the now defendant, on or about the 17th day of October, 1865, that he, the now

plaintiff, was going to return to the United States with his wife, which allegation in the said affidavit contained satisfied the said Judge that there was good and probable cause for believing that the now plaintiff, unless he was forthwith apprehended, was about to quit Canada with intent to defraud his creditors generally, or the now defendant in particular; and the said Judge being so satisfied as aforesaid, thereupon made the said order, and thereafter the now defendant caused the said *capias* to be issued, and the now plaintiff to be arrested as aforesaid, which is the said alleged cause of action in the second count mentioned.

The plaintiff having demurred to this plea, the defendant joined in demurrer, and took the following objections to the second count:

1. That the said second count does not shew what facts and circumstances in said affidavit were set out, or that any fraud or falsehood was practiced by the said now defendant, in setting out such facts and circumstances, or that the same were not fairly and truly stated in said affidavit.

2. That it does not allege that the said affidavit did not shew such facts and circumstances as are required by the statute in that behalf to be contained in such an affidavit, or that the said special order was set aside or discharged by reason of any irregularity, or insufficiency, or falsehood of any such facts or circumstances as were therein set out.

3. That until such special order, or the arrest made under the said writ issued thereon, has been set aside, said order affords a sufficient protection to the defendant herein, the said count not shewing that there were not facts and circumstances set out in such affidavit as required by the statute in that behalf, or that any such facts and circumstances were falsely and fraudulently stated, and misled or imposed upon the said Judge.

4. That the said second count only alleges that defendant swore that he verily believed, &c., which was a mere statement of opinion of defendant, and not a fact or circumstance such as could have satisfied the said Judge as alleged.

5. That the said Judge having jurisdiction to make the

said special order, is a justification to defendant acting in pursuance thereof; said second count not shewing that the same was procured by a false statement of facts and circumstances by defendant, or that it was fraudulently and maliciously procured, without shewing any such facts and circumstances in the manner and as required by the statute in that behalf.

C. S. Patterson, for the plaintiff, cited *Gibbons v. Alison*, 3 C. B. 185; *Daniels v. Fielding*, 16 M. & W. 200; *Davis v. Noake*, 6 M. & S. 32; *Whitworth v. Hall*, 2 B. & Ad. 695; *Ross v. Norman*, 5 Ex. 359.

J. A. Boyd, contra, cited *Steward v. Gromett*, 7 C. B. N. S. 204, 208; *Hargreaves v. Hayes*, 5 E. & B. 272; *Riddell v. Brown*, 24 U. C. R. 96; *Nevill v. Loadman*, 2 F. & F. 313; *Munce v. Black*, 7 Ir. C. L. Rep. 475.

HAGARTY, J., delivered the judgment of the Court.

The plea is demurred to on various grounds. It is impossible to support it.

It merely states what plaintiff swore to, without any averment that his statements were true. It shews only what was presented to the Judge on which he made his order. It does not deny the matters complained of, and leaves the count wholly unanswered. We think it useless to say more than that we have no doubt whatever of its being a bad plea.

But defendant then excepts to the second count on many grounds.

Most of these exceptions bear their own refutation on their face. In charges for malicious arrest the grievance is that defendant maliciously, without reasonable or probable cause, set the law in motion—that by his false and untrue statements he procured from a Judge the order for bailable process.

Whether the order be afterwards set aside or not, whether for irregularity or on affidavits, as allowed by the Statute, does not in our opinion affect the right of action. If the groundwork of the action exist, the subsequent fate of the order may not affect it. A person thus arrested need not

move against the order. He may choose to leave it undisturbed, or may pay the debt immediately after his arrest, or allow the case to proceed to judgment, as is averred in the case before us. See Per Byles J., in *Steward v. Gromett*, 7 C. B. N. S. 208.

The objection chiefly pressed on the argument was that the count did not aver that the affidavit stated the facts and circumstances required by statute; or rather, perhaps, that the count only states that defendant swore that he verily believed, &c., whereas the act requires the affidavit to shew facts and circumstances to satisfy the Judge. We hardly see how this can render the count bad. A man may obtain a Judge's order for the arrest of another on insufficient materials, on an affidavit possibly containing no more than is stated in this count, through the error or inadvertence of the judge, yet we think that the person arrested may have his right of action. It is not like the question determined in this Court in *Hunt v. McArthur*, (24 U. C. R. 256) where defendant procured the plaintiff's arrest on a warrant issued by a person without jurisdiction. It is here averred that defendant made an ungrounded statement, "and by means of such false allegations, falsely and maliciously induced the said Judge" to grant the order to arrest. The count is not very artificially drawn, but it contains, we think, enough to shew a good cause of action.

Most probably the affidavit did state certain facts, and then proceeded, as stated in the count, to aver defendant's belief, as such affidavits usually do.

The defendant's argument must go the length that where a person, on a clearly insufficient statement, nevertheless has succeeded in inducing a Judge to make the order, he can take advantage of his own wrong, and urge it as an answer to a man seeking redress for a clearly malicious arrest. We cannot accede to this doctrine.

In *Daniels v. Fielding*, (16 M. & W. 206) Rolfe B. points out the distinction between the action before and since the order of a Judge became necessary for an arrest. He says, "The foundation on which an action must now rest is, that

the party obtaining the *capias* has imposed on the Judge by some false statement, some *suggestio falsi* or *suppressio veri*, and has thereby satisfied him not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor is about to quit the country. But how will it be if, without any such fraud or falsehood, a plaintiff, upon an affidavit fairly stating the facts, succeeds in satisfying a Judge that the defendant is about to quit the country, and so obtains an order for a *capias* to arrest the defendant, even though he may not himself believe that the defendant does intend to leave the country?

* * It is essential, under the present statute, that the plaintiff should allege falsehood or fraud in obtaining the original order. The action is in its nature similar to an action for a malicious prosecution on a criminal charge, and the declaration ought therefore, in analogy to the course of pleading in such actions, to state what the false charge or statement was by which the Judge was misled."

In our case the count states expressly that it was by means of a false and malicious statement of defendant's belief that the plaintiff was about to leave the country, that he induced the Judge to make the order.

Unless, therefore, we are prepared to hold it a defence that the Judge should not have acted on such a statement, although it is alleged that he did so to the plaintiff's damage, we must hold the count sufficient.

Judgment for plaintiff.

RYAN V. DEVEREUX.

Will—Devise to attesting witness—Memorial signed by him—Proof of attestation—25 Geo. II. ch. 6—Statute of frauds—C. S. U. C. ch. 82, sec. 13—“Credible witness”—Evidence taken under commission in U. C.—Proof of examination—C. S. U. C. ch. 32, secs. 19, 21.

In ejectment the plaintiff claimed under the heir-at-law of J. D., defendant under J. D.'s will, by which the land in question was devised to defendant, with a devise over to another son if he died before 25, and similar devises over if that and other devisees named died before that age, his son John being the last named; but whoever got the property was to pay each of his children £5. There were the names of three attesting witnesses, John, and M., who had married one of testator's daughters, being two of them; and the will was registered on a memorial signed by John as one of the devisees. The jury, however, found that John was not in fact an attesting witness.

Held, that this finding was wrong, upon the evidence set out below, and that it should have been shewn whether testator's title was registered, for otherwise registration of the will under C. S. U. C. ch. 89 would be unnecessary. A new trial was therefore ordered.

If John was an attesting witness, then under 25 Geo. II. ch. 6, the devise to him was void, and the registry on a memorial signed by him as devisee was ineffectual.

If he was not, then of the two remaining witnesses, M. was disqualified, for the devise to his wife of a legacy was not avoided by 25 Geo. II., and it made him not a *credible* witness within the Statute of frauds.

Consol. Stat. U. C. ch. 82, sec. 18, which allows wills to be attested by two instead of three witnesses, changes the number only, not the character; they must still be “credible” witnesses.

Semble, therefore, in either case, if the will required registration the plaintiff would be entitled to recover.

Consol. Stat. U. C. ch. 32, secs. 19, 21, authorizes the examination of aged or infirm persons under commission within, or of any persons out of, Upper Canada, but provides for the proof and reception of such latter examination only. *Held*, that an examination within U. C. was clearly, by necessary intendment, made receivable when duly taken, which in this case was proved by the commissioner.

EJECTMENT for lot 22 in the 1st concession of McKillop. Writ tested 28th of June, 1866. Defence for whole.

The trial took place at Goderich, in October last, before Hagarty, J.

The plaintiff proved the death of John Devereux, under whom as owner in fee both the defendant and himself claimed the land, to have happened in 1850, and that he died in possession of the premises. William Devereux was his eldest son, and a deed from him to the plaintiff, dated 26th May, 1866, for valuable consideration, was proved.

On the defence a commission to examine Dennis Downey, issued under the seal of this Court, tested 4th August,

1866, was offered in evidence, with the examination and papers attached thereto. This commission was sued out under a Judge's order, made in Chambers on the 2nd of August, directing that Dennis Downey, then within the jurisdiction, might be examined before J. Y. Elwood, Esq., upon interrogatories, at his (Downey's) house in the township of McKillop, and (after other particulars) that the plaintiff should be at liberty to cross-examine the witness upon cross interrogatories or *vivâ voce*, and that the witness might be further examined and cross-examined *vivâ voce*. The usual provision for the return of the commission and the examination taken was inserted. The Commissioner was called as a witness, and proved the execution of the commission and the taking of the examination, and the taking an affidavit himself of the execution, which affidavit was attached to the commission. A medical witness was called and proved that Downey was then in McKillop, infirm and confined to his bed, not able to attend Court.

The plaintiff's counsel objected, that the affidavit made by the Commissioner of due execution was insufficient, and did not shew that the papers annexed were the examinations taken by him. His *vivâ voce* evidence answered these objections, and the evidence was read.

Downey proved the execution of the will by the deceased in the presence of himself and Peter McCann, and that they subscribed their names in each other's presence, and in presence of the testator, and at his request; but there was the name of a third witness, John Devereux, junior, subscribed, and Downey could not swear that he saw him sign, nor that the signature was his; nor that he was present when the testator signed it, though he might have been; he thought he was; he was in the room and near testator's bed at one part of the time. Downey swore he took charge of the will as soon as it was executed, and that it was in his possession, except when left at the registry office, till about two years before his examination, when he gave it up to the defendant. It had not been altered while in his possession.

The will had endorsed upon it a certificate of registration upon the 29th of January, 1857.

By this will the testator gave (after the death of his wife, which happened four years after testator died) the lot in question to his son Edward, the defendant, but he was not to get possession until he was twenty-five years old. If he died before, there was a devise over to another son, and if he died under that age the land was given to another, and on the similar event of his death, then to John; and whichever of them got the property was to pay to the rest of his children the sum of £5. John Devereux was one of the executors. William, the testator's eldest son, was not named in the will. The testator left the following children him surviving:—1. William, 2. John, 3. Thomas, 4. Mary, 5. Elizabeth, 6. Margaret, 7. Edward, 8. Robert, 9. James, 10. Catherine, 11. Ellen. Peter McCann, one of the subscribing witnesses to the will, married the testator's daughter Mary. John Devereux could not say whether he had subscribed his name as a witness to the will or not. He signed the memorial for the registration of the will, in which memorial the will was stated to be executed in presence of the three subscribing witnesses, but though they were all named neither of their places of abode nor addition was given. John Devereux required it to be executed as "one of the devisees."

The plaintiff's counsel objected to the registration as void: that the memorial did not comply with the directions of the statute as regarded the places of abode and the residence of the witnesses, and the affidavit of execution was insufficient, not stating where the will had been executed; also, that John Devereux could not legally execute the memorial, and being a devisee could not be a subscribing witness.

It was left to the jury to determine whether John Devereux, as a matter of fact, did attest the execution of the will in presence of the other witnesses and of testator, and at the request of the testator.

As to other points arising—among others, whether Peter McCann was a good witness to the will, being at the time

married to a daughter and legatee of the testator—it was agreed the learned Judge should direct for defendant, leave being reserved to the plaintiff to move to enter a verdict for him, if on the whole evidence the Court should think him entitled to recover.

The jury found that there was no proof that John Devereux signed the will, or that he signed in presence of the other witnesses, and they gave a verdict for defendant.

Robert A. Harrison obtained a rule to enter a verdict for the plaintiff, on the following grounds:—1. That the will of Devereux, deceased, was not proved to have been executed and attested so as to pass real estate. 2. That even if so proved, the same was not duly registered, and so was void against the deed to the plaintiff from the heir-at-law of John Devereux, deceased.

Or for a new trial for the improper reception of the evidence of Dennis Downey, there being no law in force to warrant the same being so received, and if there were, the due taking of the examination thereunder was not duly proved.

K. McKenzie, Q.C., and *McMichael*, shewed cause, citing *Hatfield v. Thorp*, 5 B. & Al. 589; *Jarman on Wills*, 3d Ed. vol. I., p. 67.

Leith and *Robert A. Harrison*, contra, cited *Doe Taylor v. Mills*, 1 Moo. & Rob. 288; *Holdfast dem. Anstey v. Dowsing*, 2 Str. 1253; *Crawford v. Curragh*, 15 C. P. 55; *Wigan v. Rowland*, 11 Hare 157; *Williams on Real Property*, 5th Ed. 177; *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 601.

DRAPER, C. J., delivered the judgment of the Court.

The objections to the registration of the memorial are three. The first is that the memorial did not contain the names and additions of all the witnesses to the will, and their places of abode. The answer is that the memorial did contain the names of all the subscribing witnesses, and though

it did not state the place of abode or the addition of either, the statute 29 Vic. ch. 24 (Sec. 78) expressly cures that defect, by enacting (amongst other things) that no registration of any deed or other instrument theretofore made (*i. e.* before the 18th of September, 1865,) shall be adjudged void by any such omission.

The second objection is that the affidavit does not state the place at which the will was executed. The law did not require it, as it then stood, for it required only that one of the witnesses to the will or Probate thereof (if the will was not made out of Upper Canada) should swear to the execution of the memorial. Here that and even more is sworn to in the affidavit. Even if the affidavit had been defective on the ground suggested, we should have held, for the reasons given in *Magrath v. Todd* just decided (*ante* p. 87) that the omission did not vacate the actual registration.

The third objection is, that although John Devereux, Jr., was named as a devisee of the land in question, contingent on the previous devisees dying without attaining the age of twenty-five, that by his becoming a witness to the will, the devise to him became void under the Statute 25 Geo. II., c. 6, and therefore he could not execute a valid memorial of the will for registration, because our registry act required that the memorial should be under the hand and seal of some devisee or the executor, &c., of some devisee named in the will.

The 25 Geo. II., c. 6, s. 1, enacts that if any person shall attest the execution of any will or codicil which shall be made after the 24th of June, 1752, to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, (other than or except charges on lands for payment of debts) shall be given or made, such devise, &c., shall so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void, and such person shall be admitted as a witness to the execution of such will or codicil within the intent of the statute of frauds, notwithstanding such devise, &c.

If then John Devereux, Jr., was a subscribing witness to the will, the devise to him was annulled by the statute, and the registration of a memorial signed by him as devisee was not sanctioned by the registry law; he was a stranger to the estate. Then the registry act applying to this case (Consol. Stat. U. C. c. 89) provides (s. 44) that every devise by will of the lands, &c., contained in any memorial duly registered, made and published after the registering of such memorial, shall be adjudged fraudulent and void against a subsequent purchaser for value, unless a memorial of such will be registered within the twelve months next after the death of the testator limited by the act.

But all that appears respecting the testator's title is that he died in possession, and that both plaintiff and defendant claim through or under him. It was not proved that there was a memorial affecting this land registered before the memorial of the will, for the evidence of the deputy-registrar—who was called for the plaintiff and produced the original memorial of the will, and added, there was "*no other memorial*"—refers evidently, I think, to the will not to the land, the object of calling him by the plaintiff being to raise the objection to the execution of the memorial, and to the affidavit proving such objection.

It is however a question whether John Devereux, Jr., was a witness to the will, within the meaning of the statutes. His name is subscribed as a witness. Both he and Downey swear he was in the room, and Downey says "Peter McCann was in the room at the time of signature, he saw testator sign the will. John Devereux, Jr., was in the room also; he was near the bed. I cannot say whether he signed as a witness or not. I do not think ever John Devereux, Jr., got the will from me to sign as a witness after the will came into my possession."

Downey himself makes the affidavit for registration of the memorial, in which it is stated that the will was witnessed by the three—Downey, McCann, and John Devereux, Jr. There is a curious mistake in his affidavit. He swears to the execution of the will as well as of the memorial, and that the memorial was attested by him and the *two*

other subscribing witnesses, there being only one other witness to the memorial while there are three names written as witnesses to the will. John Devereux, Jr., does not deny that the signature to the will is his own; he admits that it is like his signature, but cannot remember whether he signed it or no.

The jury, however, delivered their finding upon this question in writing, "that there is no proof that John Devereux "signed the will nor the witness in the presence of each other," a very dubious statement, capable of the interpretation that John Devereux (testator's name) did not make the will, but at all events meaning that the witnesses did not sign in each other's presence. If it had been left to the Court to draw inferences of fact, I should have been irresistibly brought to the conclusion that John Devereux, Jr., was as much a subscribing witness as either Downey or McCann. Indeed the jury have (inadvertently no doubt) decided a point of law, that there was no proof, whereas there was proof, by which word I think they meant evidence, upon that point, which upon the evidence was left to them to decide. I can conceive no motive for John Devereux, Jr., signing the will as a witness after his father's death, if he had the opportunity, which Downey's testimony goes very far to negative, for besides his statement of his keeping the will from the time of its execution till it was sent to be registered, he says the papers for registration were prepared in the registry office, and as he swore to the execution of them, the reasonable inference is he was there also, and if so that he took the will with him.

The finding of the jury that the "witness" did not sign "in the presence of each other," *may* mean that there is no proof that John Devereux, Jr., signed in the presence of each of the other witnesses. If so it is unhappily expressed, especially after their finding that there is no proof that John Devereux signed the will at all. If the meaning be that neither of the witnesses signed in each other's presence, then the will was not duly executed under Con. Stat. U. C. c. 82, sec. 13, and the enquiry would still remain whether

it was signed by two witnesses in the presence of the testator (two being by our statute sufficient in place of three), and so valid under the statute of frauds. This alternative mode of attestation is affirmed in the case of *Crawford v. Curragh* (15 C. P. 55), and we should, if necessary, follow that decision, as made by a Court of co-ordinate decision, until reversed by a higher tribunal. But I advisedly abstain from expressing an opinion of concurrence in or dissent from that decision. I have not arrived at any positive conclusion upon it.

But assuming, as we do, that John Devereux, Jr., was a subscribing witness to the will, and that no memorial thereof has been duly registered because he was not a devisee, it must be settled whether the title of the testator was registered or not. If the parties cannot agree upon this, the case must go to another jury. If the testator's title was not registered the registration of the will was unnecessary, and the verdict for the defendant is right, if the will was duly made.

But another question is raised as to that. It is assumed that John Devereux, Jr., was rightly found not to be a witness to the will; that either he did not sign at all, or, if he did, that he neither signed in testator's presence nor in the presence of the other witnesses. Still the execution attested by two witnesses is by our statute enough, and the plaintiff objects that Peter McCann is not a "credible" witness within the meaning of the statute of frauds.

The facts on which this objection is rested are that at the time of the making the will Peter McCann was married to one of testator's daughters, and that the will gives a legacy, payable by that one of the sons who gets the land, to each of the other children of the testator. It depended on a contingency which of the sons should take, but the legacy was to be paid by that one, whoever he might be. Now a credible witness means a witness not incapacitated by mental imbecility, interest, or crime. It has been decided that the statute 25 Geo. II. does not apply where the witness took an interest consequentially and not directly under the will. *Hatfield v. Thorp* (5 B. & Al. 589) is a direct authority on this point; and where the gift was of personalty, *Emanuel v. Constable* (3 Russ. 436) shews that the legacy is not void,

wherefore it appears that Peter McCann was an interested witness by reason of the legacy to his wife, and so not *credible* within the language of the statute of frauds.

It has been argued that our act (ch. 82 already noticed) does not contain the word credible, and that, as it says a will attested by two witnesses shall have the same validity and effect as if attested by three witnesses, this will is proved. We have no doubt whatever that the change intended by those words related exclusively to the number of witnesses, not to their character, and that it was not intended to make good an attestation by witnesses who derived a benefit under the will. If, therefore, the finding of the jury that John Devereux, Jr., did not sign as a witness to the will be adopted, then no will has been executed as required by law attested by two witnesses, and the plaintiff is entitled to recover.

The sufficiency of the signature of witnesses as *attesting* the execution of the will has not not been made a point in this case. (a).

We think there should be a new trial, as we think the finding as to John Devereux, Jr., having signed as a witness really contrary to evidence, and because, if he did attest in that character, as that act would avoid the devise to him, then apparently the will was executed in the presence of two credible witnesses; also, because we ought to have it settled whether the title was registered or no before the memorial of the will.

As to the objection to the reception of the evidence of Dennis Downey, we thought it of so little weight that we had nearly overlooked it. The law as applicable to the point has been in force since 1822, and no one we think until now has suggested a doubt that when the Legislature authorized the issuing of a commission to take the examination of any aged or infirm person resident within Upper Canada, whose testimony the plaintiff or defendant in any cause is desirous of having at the trial thereof, they did not by necessary intendment mean that the examination duly taken should be received at the trial without further

(a). The attestation clause was "Signed, and sealed, and delivered, in the presence of Dennis Downey, Peter McCann, John Devereux, Junr."

words. As to the due taking of the examination not being duly proved, the commissioner himself was examined, and stated what he did as well as identified the examination which he returned. The formalities pointed out in a subsequent section of the same act relate only to examinations taken without the limits of Upper Canada.

Rule absolute for new trial.

DAVIS V. BARNETT ET AL.

Maliciously procuring proceedings in Chancery—Interfering with plaintiff's business—Right of action for—Pleading.

The first count of the declaration alleged that the plaintiff was an hotel keeper at Niagara Falls, and furnished guides and dresses to persons going under the Falls, and by consent of the Government had a stairway for visitors down the bank of the river; that defendants also had a stairway for the same purpose; that the plaintiff's stairway had been burned down, and while he was rebuilding it defendants, contriving to injure him, falsely and maliciously, and without reasonable or probable cause, represented to the Attorney-General that the land on which the plaintiff's stairway was built (which belonged to the Crown) was necessary for military purposes, and that the land on top of the bank was required for a highway, and had so been used for many years by license from the Crown, and that the plaintiff had wrongfully intruded on said land, and had begun to excavate and destroy the cliff at the top of the bank, reducing the width of the road; and thereby defendants induced the Attorney-General to permit the use of his name in filing an information in Chancery to restrain the plaintiff, and obtained an injunction against the plaintiff to restrain him, from interfering with the bank; whereby the plaintiff was delayed in completing his stairway until he obtained a license from the Crown so to do, and lost the profits of his business, &c.

The second count alleged that the plaintiff and defendants were both engaged in furnishing refreshment and dresses to persons wishing to go under the Falls; that there was a certain public stairway for such persons down the bank; that defendants, intending to injure the plaintiff, falsely and maliciously, and without reasonable or probable cause, represented to the public wishing to go down the stairway, that they had a right to prevent them, and forbade and refused to allow persons wearing dresses furnished by the plaintiff to pass down, by reason whereof hundreds of persons who would have procured dresses from the plaintiff, were forced and obliged to get their dresses from defendants, and the plaintiff lost the profit of hiring his dresses and selling refreshments, &c.

Held, on demurrer, that both counts were bad; for as to the first, no action would lie so long as the decree in equity remained in force, notwithstanding the subsequent license from the Crown; and as to the second, it charged no violation of any right of the plaintiff, nor the maliciously procuring the breach of any contract with him, and it therefore shewed no cause of action.

DECLARATION.—*First count*—For that the plaintiff, before and at the time of the committing of the grievances herein-

after mentioned, was in possession of lot number 11, in the Town of Clifton, in the Township of Stamford, in the County of Welland, near to the Falls of Niagara on the Niagara River, and carried on the business of hotel keeping, and furnishing guides and dresses for hire and reward to persons going under the Falls, and had before the committing of the grievances hereinafter mentioned erected a stairway, with the consent of the corporation of the Town of Clifton, as well as of the Government of Canada, from the top of the bank of the said Niagara River down the side thereof, to near to the foot of the bank, for the accommodation of the public who wished to go down the said bank or under the said Falls; and the plaintiff acquired great gains and profits from the furnishing of dresses as aforesaid to persons using the said stairway for the purposes aforesaid. And the defendants, before and at the time of the committing of the grievances hereinafter mentioned, were in possession of lots 15 and 16, in the said Town of Clifton, near the said Falls of Niagara, and had built a road or stairway down the side of the bank of the said river, in front of his said lots, for the accommodation of the public wishing to go down the said bank, and provided guides, and furnished dresses for hire and reward to persons wishing to go down the said bank for the purpose of passing under the said Falls. And shortly before the committing of the grievances hereinafter mentioned by the defendants, the said stairway so built by the plaintiff was burned down and destroyed, and at the time of the committing of the grievances hereinafter mentioned, the plaintiff was rebuilding his said stairway. And the defendants, well knowing the premises, and contriving to injure the plaintiff in his business, and to increase the business of the defendants, falsely and maliciously, and without reasonable or probable cause, represented to the Honorable John A. Macdonald, Her Majesty's Attorney-General for Upper Canada, (the land where the plaintiff's said stairway was being erected being part of the ungranted lands of the Crown) that the said lands where the said stairway was being erected were necessary for the defence of the realm

and for military purposes, and that the land to the width of sixty six feet inwards from the top of the bank was necessary for the public use, as a way for horses, carriages, and persons, and had by license of the Crown been used as a public road or thoroughfare for many years, the same being one of the usual and customary resorts of thousands of persons who yearly visit Niagara Falls; and that the plaintiff had wrongfully intruded to a small extent of about ten feet upon the said land of the Crown, and that the plaintiff had begun to excavate and destroy the cliff at the top or edge of the bank of the said river opposite the property of the plaintiff, and had already excavated a large portion thereof, extending inwards from the former edge of the said bank about nine feet, and had reduced by about that space the width of the said way, and that he was continuing, and would continue, unless restrained, to proceed further to excavate and destroy the said cliff and narrow the said way, and had destroyed part of the said carriage road, and caused and was causing irreparable injury to Her Majesty and the public, in order to induce, and the defendants did thereby induce, the said Attorney-General for Upper Canada to permit them, the said defendants, to use the name of him, the said Attorney-General, as such Attorney-General, in the filing of a certain information in the Court of Chancery, and in certain other proceedings taken by the said defendants in the name of the said Attorney-General, to restrain the plaintiff from excavating or interfering with, or intruding on the cliff or bank of the said river; and the said defendants then filed an information in the name of the said Attorney-General, and obtained an injunction against the plaintiff to restrain him from interfering with the said bank of the said river; whereby the plaintiff was hindered and prevented from completing his said stairway for a long time, and thence until he procured a license from the Crown so to do—whereby the said plaintiff was much injured in his business, and deprived of great gains and profits which he would have made by the hiring of dresses to persons going down his said stairway, and who

got dresses instead from the defendants, and passed down their said stairway.

Second count.—And also for that the defendants and the plaintiff were engaged in the business, among others, of furnishing refreshments and dresses for hire and reward to persons wishing to pass under the Falls of Niagara, to protect them from the spray and water, and at the time of the committing of the grievances hereinafter mentioned there was and still is a certain stairway down the side of the bank of the Niagara River, opposite certain land of the defendants, and near to the hotel and place of business of the plaintiff, which said stairway was a public way for the passage down the said bank of the river of all persons who might choose to use the same for passing behind or under the Falls. And the defendants, well knowing the premises, but intending to injure the plaintiff, falsely and maliciously, and without reasonable or probable cause, represented to the public wishing to pass down said stairway that they had a right to prevent persons passing down the said stairway, and forbade and refused to allow persons wearing dresses furnished by the plaintiff to pass down the said stairway; by reason whereof hundreds of persons visiting the Falls and passing thereunder, who would otherwise have procured dresses from the plaintiff, were forced and obliged to get their dresses from the defendants—whereby the plaintiff lost divers great gains and profits, that he might and otherwise would have made by persons using his dresses, and from the sale of refreshments to persons visiting his hotel near to the said stairway to get such dresses, and his dresses became useless to him.

Demurrer to the first count, on the following grounds:

1. It does not appear in the said count that the said proceedings taken in the name of the said Attorney-General, in the said count mentioned, were determined in the plaintiff's favor, or that the said proceedings were determined against the said Attorney-General or the defendants.

2. The said count does not disclose a good or any cause

of action, because an action does not lie for taking, or causing, or procuring legal proceedings, or proceedings in Chancery against a party, when he is convicted, or judgment or decree is pronounced against him.

3. It does not appear that the plaintiff sustained any damage or injury by reason of the representation in the said first count mentioned.

4. It does not appear that the plaintiff was prevented from completing his stairway in the said count mentioned by reason of the proceedings taken or the injunction mentioned in the said first count.

5. It does not appear that there was not reasonable or probable cause for taking the said proceedings, or procuring the same to be taken, or for obtaining the said injunction, nor does it appear that the said proceedings were taken by reason of the said representations.

Demurrer to the second count, on the ground that it is not shewn that the alleged damage is in consequence of the act of the defendants complained of in the said second count.

There was also a plea to the second count, which was demurred to, and which it is unnecessary to set out, as the judgment proceeds upon the declaration only.

Kerr, for the demurrer, cited *Cotterell v. Jones*, 11 C. B. 713, 728-9; *Collins v. Cave*, 4 H. & N. 225. In Error, 6 H. & N. 134; *Behn v. Kemble*, 7 C. B. N. S. 260, 267; *Goddard v. Smith*, 6 Mod. 261; *Griffith v. Ward*, 20 U. C. R. 31; *Ashley v. Harrison*, 1 Esp. 48; *Sedgwick on Damages*, 2nd Ed., p. 30; *Craig v. Hasell*, 4 Q. B. 491.

M. C. Cameron, Q. C., contra, cited *Garret v. Taylor*, Cro. Jac. 567; *Keeble v. Hickeringill*, 11 East 576, note; *Bell v. Midland Railway Co.*, 10 C. B. N. S. 307; *Craig v. Hasell*, 4 Q. B. 491; *Tarleton v. McGawley*, Peake 270; *Addison on Torts*, 2nd Ed., p. 10, 531.

HAGARTY, J., delivered the judgment of the Court.

The case of *Munce v. Black* (7 Ir. C. L. Rep. 475) seems to bear the nearest resemblance to the facts in

the first count. The plaintiff was tenant from year to year of land which defendant purchased in the Encumbered Estates Court. It was charged that defendant, to injure the plaintiff, falsely and maliciously, &c., swore to various facts—in substance, that the plaintiff refused to attorn to him as tenant and pay rent—whereby he procured an order that the plaintiff should attorn within ten days, or in default an injunction should issue to the Sheriff to put defendant in possession: that defendant made further false affidavits, that the plaintiff would still not attorn, &c., and thereupon an injunction was issued and the Sheriff turned the plaintiff out, and put defendant in possession; and there were averments negating all defendant's statements. Plaintiff demurred, on the ground of not shewing that the process in the Encumbered Estates Court was terminated.

The Court held the declaration bad, adding, "In none of those cases, where it is the immediate act of a Court of competent jurisdiction, exercising a judicial act, has the pleading been held good, unless it be shewn in it that the proceeding is at an end and done away with, and no longer a protection to the parties." Counsel for the plaintiff urged that the proceeding was at an end, as being executed and completed. Greene, B., says, "Being at an end, means in the favor of the person bringing the action."

In *Castrique v. Behrens* (30 L. J. Q. B. 167), Crompton, J., delivered the judgment of the Court (after a long argument and *curia advisari*), "There is no doubt, in principle and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though, not for a mere conspiracy to do so, without actual legal damage; but in such an action it is essential to shew, that the proceeding alleged to be instituted maliciously and without probable cause, has terminated in favor of the plaintiff, if, from its nature, it be capable of such a termination. The reason seems to be, that if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principle on

which law is administered for another court, not being a Court of Appeal, to hold that the decision was come to without reasonable and probable cause."

In *Whitworth v. Hall* (2 B. & Ad. 696), a nonsuit was ordered, on the ground that a commission of bankruptcy must be superseded before an action would lie for suing it out maliciously.

To the same effect is *Mellor v. Baddeley* (2 C. & M. 675), and *Griffith v. Ward* (20 U.C. R. 31).

Craig v. Hasell (4 Q. B. 481), was relied on by both parties. It is a very peculiar case. It charged a malicious affidavit made in the Exchequer as to the plaintiff owing a Crown debt, that he was embarrassed, and the debt in danger, whereby an inquisition was had, and the plaintiff was found indebted as alleged, and defendant then falsely, maliciously, and without probable cause, caused a writ of extent to be issued, on which the plaintiff's property was seized; that afterwards the extent was superseded, and was then ended—with negative averments as to what defendant had sworn. The Court held the declaration sufficient. Lord Denman says, "The writ of extent is the grievance; and all that the rule of law, in cases of malicious prosecution, requires, is, that the writ of extent should be traced to its close; and that is done by shewing it discharged by the Court, though upon an arrangement and by consent." Coleridge, J., says, "If the grievance here be the procuring the writ to issue, it is sufficient to shew that the writ is at an end."

Barber v. Lesiter (7 C. B. N. S. 174), may also be referred to, and *Collins v. Cave* (4 H. & N. 225).

We think, on the authorities, that the first count cannot be maintained. It is impossible, we think, so long as the decree of the Court of Equity remains in force, to hold that an action will lie against the defendants for setting in motion the proceedings that led to that decree. To hold that the defendants acted without probable cause, &c., would lead to the conclusion that the decree was made in the same manner.

The subsequent granting of a license from the Crown to the plaintiff, does not, we consider, affect the question of pleading. The act of the plaintiff in encroaching, &c., on Crown property, *without* license, might be the very ground of the legal proceedings.

It is to be observed that, unlike most actions of the kind, the count contains no averments negating the truth of any statement made by defendants.

The second count is, substantially, that defendants falsely represented to the visitors intending to use the common stairway, that they had a right to prevent them passing down, and forbade and refused to allow persons wearing the plaintiff's dresses to pass down, whereby hundreds of persons who would otherwise have used the plaintiff's dresses, were forced and obliged to get dresses from defendants. In other words, a tradesman stands in the highway, and tells travellers he has a right to prevent them passing, and forbids them passing, and refuses to allow any persons wearing a rival tradesman's clothes to pass by.

It is to be observed, that there is no assertion of any force being used, or act done, no direct averment that defendants actually prevented any one from passing down, or conspiracy entered into or slander uttered against the plaintiff, personally or in his business character. It is said that the visitors were thereby "forced and obliged" to use defendants' dresses instead of the plaintiff's, without saying how this was effected; and it seems to resolve itself into a statement that defendants made false statements to the public, which the latter chose to believe. "The case of a simple lie, where the party is under no obligation to tell the truth, gives no cause of action."—Per Pollock, C. B., in *Collins v. Cave* (4 H. & N. 232).

There seems a wide difference between a false or deceitful representation made to a man with the intention it should be acted on, and it is acted on to the man's own prejudice, and his acting on it to another man's prejudice. The former can maintain an action; it is not so clear that the latter can, apart from any question as to slander.

There is an instructive note to *Carrington v. Taylor* (11 East 576), giving a judgment of Lord Holt, who says, "One schoolmaster sets up a new school, to the damage of an ancient school, and thereby the scholars are allured from the old school to come to the new. The action there was held not to lie. But suppose the defendant should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither: sure that schoolmaster might have an action for the loss of his scholars. A man hath a market, to which he hath toll for horses sold; a man is bringing his horse to market to sell; a stranger hinders and obstructs him from going thither to the market: an action lies, because it imports damage. Action on the case lies against one that shall, by threats, fright away his tenants at will." In the case in East it was held that firing off guns at wildfowl, near the plaintiff's decoy, and thereby frightening away the wildfowl from the plaintiff's decoy, intending to disturb the plaintiff in the profits of his decoy, was actionable.

In *Tarleton v. McGawley* (Peake 270), an action was maintained by a trader to the African coast against another trader, for preventing the natives coming to the plaintiff's ship to trade, by firing a cannon at them. This rather strong proceeding on defendant's part was held actionable.

In *Green v. Button* (2 C. M. & R. 707), a plaintiff bought certain goods from A. B., intending to injure him, falsely stated to A. that he, B., had a lien on the goods for part of the purchase money advanced by him to the plaintiff, and he requested and induced A. to keep them in his possession, and not deliver them to the plaintiff until further directions from B., whereby A. did keep them three weeks, to the plaintiff's injury. Barons, Parke, Alderson, and Gurney, held the declaration good on demurrer.

In *Bell v. The Midland Railway Co.* (10 C. B. N. S. 307), Willes, J., cites Comyn's Dig. Action upon the case for Misfeasance, A. 6. An action will lie if a man "threaten the tenants of another, whereby they depart from their tenures," or, "if he threaten the workmen and cus-

tomers that come to his stone-pit, whereby he loses the profit of it."

In *Garret v. Taylor* (Cro. Jac. 567), an action was held to lie against defendant for disturbing the plaintiff's workmen and all comers at his stone-quarry, threatening to mayhem and vex them with suits if they bought any stones; whereupon they desisted from buying and working. Objected "that nothing is alleged, but only words, and no act nor insult, and causeless suits on fear are no cause of action. —*Sed non allocatur* : for the threatening to mayhem, and suits, whereby they durst not work or buy, is a great damage to the plaintiff, and his losing the benefit of his quarries a good cause of action." See also *Rogers v. Rajendro Dutt* (13 Moo. P. C. C. 241), in which the judgment, at p. 209, contains the following language : "It is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining—that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interests, is not enough. Cases are of daily occurrence in which the lawful exercise of a right operates to the detriment of another, necessarily and directly, without being actionable."

The subject is discussed in the notes to *Vicars v. Wilcocks* (2 Sm. Lea. C. 460, 5th Ed.)

In *Addison* on Torts, 2d Ed. p. 11, it is said, "It is essential, therefore, to the maintenance of an action of tort, that the act complained of should be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will do him harm is not enough."

Erle, J., says, in *Lumley v. Gye* (2 E. & B. 233), "He who maliciously procures a damage to another, by violation of his right, ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery, and both ought, on the same ground, to be made responsible."

If this be the correct view of the law (though I believe the decision of *Lumley v. Gye* has been questioned), it explains the decision in *Green v. Button*, and throws some light on the case before us. The count here does not charge any violation of any "right" of the plaintiff. He had no *right* to require the visitors to take his dresses or his refreshments, nor did defendants maliciously procure the breaking of any *contract* made with the plaintiff.

If the count mean that defendants, by any act, prevented the public from passing down the public stair, they would be certainly liable to an action at the suit of any person so prevented. If they "forced" visitors, by any actual compulsion, to wear their dresses, they would be equally trespassers at such person's suit. If the stairway had been the plaintiff's property, and he entitled to a fee from each person using it, then the alleged conduct of defendants might perhaps bring the case within the principles laid down by Holt, C. J., already cited, and the case of the stone-quarry in Cro. Jac.

We have arrived at the conclusion that the second count is bad, and that to hold otherwise would be to extend the right of action arising from a defendant's statements made to, or dealings with, third parties, beyond the bounds of established liability.

Judgment for Defendants.

IN THE MATTER OF A SUIT IN THE COUNTY COURT—

FURNIVAL V. SAUNDERS.

County Court—Jurisdiction.

Upon the evidence in the County Court it appeared that the plaintiff, under the common counts, was claiming an amount of \$771, reduced to \$304 by credit given, but not by payment or by set-off agreed to be taken as payment. *Held*, that the \$304 was not an amount liquidated or ascertained by the act of the parties, and that the claim therefore was beyond the jurisdiction.

A plaintiff cannot by giving credit for a set-off compel defendant to set it up, or give the County Court jurisdiction.

In Trinity Term last, *Hector Cameron* obtained a rule calling upon the Judge of the County Court of Wentworth

and the plaintiff, Furnival, to shew cause why a writ of prohibition should not issue, to restrain the further prosecution of the suit of Furnival v. Saunders, on the ground that the County Court had no jurisdiction, inasmuch as the amount sued for exceeded the jurisdiction of the County Court, and was not ascertained by the act of the parties or the signature of the defendant.

The application for the rule *Nisi* was grounded upon an affidavit of the attorney for Saunders, attached to which was a copy of the evidence given at the trial.

The action was brought on the common counts, and the pleas were never indebted, payment, and set-off.

The plaintiff's evidence was as follows :

James Moran was examined.—“I am in the plaintiff's employment ; he is a merchant tailor ; I have been in his employ since August, 1863 ; I know defendant and his handwriting ; the signature to the agreement produced is in the handwriting of defendant (agreement between plaintiff and defendant put in) ; there is an account in plaintiff's books of defendant's account, kept in the handwriting of defendant—the whole of the account is in his handwriting ; it commences in April, 1861, and ends in August, 1863. In the account there are two entries of \$1000 each, credited to defendant for wages, both in his handwriting, one in February, 1862, and the other in February, 1863. The account is balanced in the books ; the last entry balancing the account is an entry of \$589.85 trade expenses. The balance due to plaintiff by defendant, making up his salary to August, when he left, would be \$304.06.”

Cross examined.—“The books as balanced do not shew any balance against defendant ; there is no account in the books in defendant's handwriting shewing any balance against himself. In Furnival's account there are entries of \$1000 carried to the same account, namely, trade expenses, the only difference between the entries being, that the credits in defendant's account are expressed to be for wages.”

Re-examined.—“The defendant debits himself, in his account, with items in the whole amounting to \$2913.54 ;

there is an additional item of \$3.50, not in defendant's handwriting, making the debit side of the account \$2917.04; the credit side of the account, leaving out the last entry (\$589.85), amounts to \$2145.26. There is nothing to shew that defendant had any authority for making the entry balancing the accounts."

Upon this evidence, Freeman, Q. C., counsel for the defendant at the trial, objected, and contended that the Court had no jurisdiction, which objection was overruled by the learned Judge.

Annexed also to the affidavit was a transcript of the defendant's account in the plaintiff's ledger, shewing the items of which the \$589.85 was composed, and the entry balancing the account and carried to folio 128. The transcript shewed that the defendant's account, in July, 1862, was then also balanced by the amount of the debit side being carried to the same folio. It also appeared by the affidavit that the agreement put in in the trial was one by which the defendant was to serve the plaintiff for one year at a salary of \$1000.

Sadleir shewed cause during this term, and cited *Walbridge v. Brown*, 18 U. C. R. 158; *McMurtry v. Munro*, 14 U. C. R. 166; *Warman v. Halahan*, 3 L. T. Rep. N. S. 379.

Hector Cameron supported the rule, citing *Jagoe* on County Courts, 19.

MORRISON, J., delivered the judgment of the Court.

From the testimony of the witness, Moran, it does not appear how he arrived at the result that the defendant was indebted to the plaintiff in the amount of \$304.06. His evidence shews that the debit side of defendant's account amounted to \$2917.04, and that the credit side of the account, rejecting the item of \$589.85, which the plaintiff contends is an improper entry, only shews \$2145.20, leaving a balance due on the account by defendant to plaintiff, if those figures are correct, of \$771.84. This amount is reduced in some way, we assume by allowing defendant

credit of an amount as salary, but there is no proof that the defendant assented to such credit, or to such balance of \$304.06. On the other hand, the defendant contends, and his entries apparently shew, that he was not indebted to the plaintiff in August, when his account was closed and balanced, and it appears by the evidence that there was no other account in the plaintiff's books which shewed a balance due by defendant.

Whether the entry objected to by the plaintiff was correct or incorrect, does not seem in our judgment to affect the question one way or the other. The fact that the plaintiff rejects the entry of \$589.85, and in order to arrive at the balance due by defendant investigates the defendant's whole account, and finds by the books that he is indebted to him in \$771.84, and which amount he reduces by deducting from it a sum on account of the defendant's salary, the correctness of which does not appear and is not proved to have been admitted or assented to by the defendant, in our opinion evidently shews that the balance claimed, \$304.06, was an amount not liquidated or ascertained by the act of the parties; and taking the plaintiff's case as it appears on the evidence, we cannot come to any other conclusion than that the defendant was indebted to the plaintiff, according to the view the plaintiff takes of his own books, in \$771.84, and that the plaintiff brought this action to recover that amount, less any sum for salary as a set-off that the defendant might be entitled to at the time he left the plaintiff's employment; and as it does not appear that that amount of \$771.84 was reduced by payment, or by a set-off which was agreed between the parties should be taken as payment, the action in our judgment was beyond the jurisdiction of the County Court.

A plaintiff cannot by giving a defendant credit for a set-off compel him to set it up, nor can he by giving credit for it at the outset give the County Court jurisdiction. We refer to *Woodhams v. Newman* (6 D. & L. 683), also to the judgment of Burns, J., in *McMurtry v. Munro* (14 U.C.R. 169).

This case may have presented itself at the trial in some

other light than that which we gather from the notes of the learned Judge of the County Court. As it appears before us on this motion, we think the action was one beyond the jurisdiction of the County Court, and that the rule should be made absolute.

Rule Absolute.

IN THE MATTER OF A SUIT IN THE COUNTY COURT,
GRASS V. ALLAN ET AL.

County Court—Prohibition—Practice—Moving against Judge's order.

A County Court Judge made an order staying proceedings in a cause, on the ground, as was alleged, that defendant was applying for his discharge under the Insolvent Act. The plaintiff applied for a prohibition against giving effect to this order, urging that there was no jurisdiction to stay the suit on such a ground. He produced a copy of an affidavit, which he swore was the only affidavit filed on obtaining the summons to stay, but did not shew that no other affidavits were filed before the order was made, although the summons contained leave to file further affidavits, and the order was drawn up on reading the *affidavits* filed (in the plural).

The prohibition was refused, for *prima facie* the Judge had authority to make such order, and the applicant did not shew that all the materials on which it issued were before the court, so as to enable them to see clearly whether he acted without jurisdiction, in which case only a prohibition should be granted.

Wallbridge, Q. C., obtained a rule *nisi* calling upon the Judge of the County Court of the County of Hastings, and James Allan and Edward Hyland, to shew cause why a rule absolute for a writ of prohibition should not be made, to prohibit them from preventing Michael Henry Grass, the plaintiff in a suit in the said County Court, in which the said Allan and Hyland were defendants, from taking further proceedings in the said suit, and to prohibit them from in anywise giving effect to an order made in the said cause and court by the Honorable George Sherwood, Judge, &c., at their instance, staying proceedings until the 1st day of January next, on the grounds:—1st. That the said judge had no authority to make such order staying the proceedings in the cause. 2. That there is no law to uphold the order so made staying proceedings for the time limited,

on the grounds on which the same was so made, namely, the existence of proceedings in the Insolvent Court of the said county, in which the said Allan was endeavoring to obtain his discharge as an insolvent from the payment of his debts, the certificate of discharge not having then or yet been given or made; the Judge having no power to stay proceedings to enable the said Allan to obtain such discharge before judgment. 3. That no grounds whatever exist for staying proceedings against the said Hyland.

It appeared from the affidavit of the managing clerk of the attorney for Grass, the applicant, filed on this application, and the papers attached thereto, that Grass brought an action in the County Court against Allan and Hyland, to recover the amount of a promissory note for \$190: that Allan and Hyland appeared and defended the action: that Allan pleaded that before the note fell due and before action he became insolvent, and assigned all his estate and effects to the official assignee, &c., and that he was within the protection of the Insolvent acts; and the defendant Hyland pleaded the same matters as a defence: that these pleas were demurred to, and judgment given against him on the 15th of October last: that on the 18th of October the defendant obtained a summons from the Judge, calling upon the plaintiff to shew cause why all the proceedings in the cause should not be stayed until the 1st of January next, upon grounds disclosed in affidavit and papers filed, with leave to file further affidavits and papers: that on the return of the summons both parties appeared before the learned Judge, when he made the following order.

“ Upon reading the summons granted by me in this cause, the affidavit of service thereof, the *affidavits* and papers filed, and upon hearing the parties by their counsel, I do order that all proceedings by or on behalf of the plaintiff herein be stayed until the 1st day of January next; the costs of this application and order to be costs in the cause.”

Attached to the affidavit filed on this application, was a copy of the affidavit of the defendants' attorney in the Court below, which was sworn to as being the *only affidavit filed*

on obtaining the summons from the County Judge; but the affidavit filed on this application did not negative that there were no other affidavits or papers filed before or at the time when the summons was argued and the order made, although the summons contained leave to file further affidavits and papers, and the order was drawn up on reading affidavits (in the plural) and papers filed.

It also appeared that Allan made an assignment under the Insolvent Acts, and that a notice had been given in the *Gazette* that he would apply for his discharge as an insolvent on the 19th of December last; and the affidavit stated that the order was granted on the ground that Allan had made an assignment and proceedings were in progress for his discharge.

Diamond shewed cause, citing *Ellis v. Watt*, 8 C. B. 614; *Chivers v. Savage*, 5 E. & B. 697; *Lexden and Munster Union v. Southgate*, 10 Ex. 201; *In re The Judge of the County Court of Elgin*, 13 C. P. 73; *Zohrab v. Smith*, 17 L. J. Q. B. 176; *Woodward v. Meredith*, 13 L. J. Q. B. 322; *Harley v. Greenwood*, 5 B. & Al. 95; *Kirby v. Ellier*, 2 C. & M. 315.

Wallbridge, Q. C., contra, cited *Baldwin v. Peterman*, 16 C. P. 310; *Ex parte Story*, 12 C. B. 767; *Marsden v. Wardle*, 3 E. & B. 696.

MORRISON, J., delivered the judgment of the court.

It was contended by Mr. Wallbridge that the County Court Judge had no jurisdiction to make such an order, and that such an order was contrary to law.

It is quite clear that the cause in which the order was made was one within the jurisdiction of the County Court. On the face of the order there is nothing from which this Court can infer that the order was not one which could be properly made by the learned Judge; a Judge of the County Court having power to issue summonses and make orders in all matters of practice in like manner, and on the like principles and grounds, and to the same extent, as in the Superior Courts.

There are numerous grounds upon which a Judge may stay proceedings in a cause. It is a very common step, and it can hardly be said that such a proceeding, in a cause within the jurisdiction of the County Court, is one beyond the authority of a County Court Judge. "It may be," as said by Pollock, C. B., in *The Lexden and Munster Union v. Southgate* (10 Ex. 202), "that the decision was erroneous; but even in a case where there is not a particle of evidence to support the decision, still if the County Court has jurisdiction that is no ground for a prohibition." If it clearly appeared that this Court had before it all the materials upon which the summons issued and the order was made in the Court below, we might arrive at a conclusion one way or the other, but all that the plaintiff brings under the notice of this Court is one affidavit, filed when the summons was issued, and from all that appears several other affidavits and papers may have been filed, and we are warranted in assuming that there were other affidavits and papers before the learned Judge at the time he gave his decision, from what appears on the face of the copies of the summons and order filed by the applicant. As said by Williams, J., in *Ellis v. Watt* (8 C. B. 615), "We must give the Judge of the County Court credit for knowing the ordinary law on this subject." And it is laid down by Maule, J., in *Ex parte Story* (12 C. B. 777), "When a prohibition is applied for, the applicant must shew clearly that the Court to be prohibited is proceeding improperly, that is, without jurisdiction, or in a manner that is opposed to the principles of justice; it is not enough to leave it to inference and conjecture." And Talfourd, J., in the same case says, "The general doctrine is well known, that prohibition is never granted where the Court sought to be affected by it has clear jurisdiction, unless it is proceeding in a manner contrary to the principles (not the *rules*) of the common law." And Coleridge, J., in *Zohrab v. Smith* (5 D. & L. 639), lays it down that, "a writ of prohibition will never issue, where the Court has jurisdiction, merely because its judgment is unwise or unjust."

Here *primâ facie* the Judge had jurisdiction to make the order complained of, and as the applicant has not shewn that he brought before us all the materials that were before the Judge of the County Court when he made his order, so as to enable this Court to see clearly whether he acted without jurisdiction, we are of opinion that this rule should be discharged.

Rule discharged.

HODGSON V. GRAHAM.

Action in C. C.—Second action in Q. B.—Discontinuance—Staying proceedings.

The plaintiff, having sued in the County Court, proved a claim beyond the jurisdiction, whereupon the jury were discharged. He then brought his action in this Court, and upon defendant's application an order was made staying proceedings until the plaintiff should discontinue the County Court action and pay the costs of it.

The order was rescinded, for 1. The County Court having no jurisdiction the plaintiff could not discontinue the suit there, which would be a proceeding in the cause; and, 2. This suit being for a debt, and not brought oppressively or vexatiously, should not have been stayed.

Kingstone, during this term, obtained a rule calling on the defendant to shew cause why a Judge's order made on the 3rd day of October last in this cause should not be rescinded, on the ground that the plaintiff could not discontinue his proceedings in an action brought in the County Court of Carleton, inasmuch as the County Court had no jurisdiction in that cause; and because it appeared on the affidavits on which the Judge's order was made that this action was not a vexatious one, and was not therefore such an action as this court would stay.

The rule was drawn up on reading the order and summons granted in Chambers, and the affidavits filed on the application there.

On the 29th November, during the same term, *Kingstone* moved his rule absolute, filing an affidavit of service of a copy of the rule *nisi* on the agent of the plaintiff's attorney, on the 22nd of November. He referred to *Portman v. Patterson*, 21 U. C. R. 237; *Powley v. Whitehead*, 16 U.

C. R. 589; *Pashley v. Poole*, 3 D. & R. 53; *Murray v. Silver*, 1 C. B. 638; *Danvers v. Morgan*, 17 C. B. 530.

No one appeared to shew cause.

It appeared from the affidavits filed, that the plaintiff in April last commenced an action against the defendant in the County Court of Carleton, to recover the amount of an account for \$357.80; that the defendant appeared, and pleaded to the action never indebted and payment; that the case came on for trial before the Judge of the County Court, and the plaintiff having proved a claim against the defendant to about \$260, closed his case, when the defendant objected that the Court had no jurisdiction, the amount being over \$200, and not liquidated or ascertained by the signature of the defendant: that the Judge gave effect to the objection, and discharged the jury, holding that the case was one beyond the jurisdiction of the County Court; that in the month of September last the plaintiff commenced this action to recover the same debt: that on the 26th of September the defendant applied to a Judge in Chambers, and obtained a summons calling on the plaintiff to shew cause why all the proceedings in this cause should not be stayed until the plaintiff should have discontinued all proceedings in the action brought in the County Court, and have paid to the defendant his costs incurred in that action, on the ground that this action was brought for the same cause of action for which the County Court action was brought; which summons the Judge in Chambers, after hearing the parties, made absolute, and made an order on the 3rd of October last staying proceedings in this action until the plaintiff discontinued the action in the County Court, and paid the costs of that action. This rule was moved to rescind that order.

MORRISON, J., delivered the judgment of the Court.

With regard to the first objection taken in the rule, we think it quite clear that the condition imposed by the order on the plaintiff of discontinuing the action in the Court below is one that ought not to have been imposed, and that the order in that respect was improvidently made. The County

Court having no jurisdiction, no proceeding could be taken in that cause. As said by Tindal, C. J., in *Murray v. Silver* (1 C. B. 639), "It is difficult to say that taking out a rule to discontinue is not a step in the cause. In order to perfect it, the plaintiff must go on and procure the costs to be taxed, which clearly would be taking a proceeding in the cause."

As to the second objection, we take the practice to be as laid down by Abbott, C. J., in *Pashley v. Poole* (3 D. & R. 53), "It is not an action complaining of a malicious arrest, prosecution, or trespass, in which cases the Court might be disposed to compel a plaintiff to pay the costs of a first action, before he was allowed to proceed in the second. This is an action for a pecuniary demand, alleged to be due from the defendants to the plaintiff, and we should be very careful before we deprived a party who has a debt owing to him of the right of proceeding in his second action. If we saw clearly that he was proceeding in the second vexatiously, we should prevent him so doing until he paid the costs. But here it appears that the first action was non-prossed in consequence of plaintiff's declaring against the defendants as trustees, instead of by name. He discovers the names of the trustees, and sees that there is no use in going on to trial, because, if a verdict was recovered, the judgment might be arrested. I see no reason therefore, and I know of no authority, for saying that in a case like this we ought to compel the plaintiff to pay the costs of the first action before he is allowed to go on with the second." And Bayley, J., in the same case, says, "If that were a general rule, it might in many instances work injustice, for the defendant might not be able to pay the costs, and the only means of paying them might be by recovering his debt." And in *Danvers v. Morgan* (17 C. B. 533), Jervis, C. J., in delivering judgment, says, "In general the practice as to staying proceedings in a second action until the costs of a former action for the same cause are paid, is confined to ejectment, which has always been considered as peculiarly the creature of the Court. The same rule does not apply to trespass.

There may, it is true, be cases where the Court would interfere in this way, as, for instance, where the second action is brought *oppressively and vexatiously*."

The case before us is an action for a debt, and which the plaintiff proved to be due in the Court below. It was not pretended that this action was brought by the plaintiff oppressively and vexatiously, nor is there any ground for such an allegation. From what appears in the affidavits filed, the term vexatious in a sense might be applied to the defendant's proceedings. On the authority of the cases referred to, we are of opinion that the rule should be made absolute.

Rule absolute. (a)

KINGHORN AND THE CORPORATION OF THE CITY OF KINGSTON.

By-law—Markets—C. S. U. C. ch. 54, sec. 294—Affidavit not entitled in any Court—Verification of By-law.

A by-law prohibiting any person bringing produce, articles, commodities or things to a city market, from selling or offering the same for sale within the city limits, on their way to market, or without having paid market toll, and before offering such things for sale in the market—*Held*, illegal, and quashed, as beyond the power of the corporation.

An affidavit in support of the motion, not entitled in any Court, but sworn before a commissioner styling himself "A Commissioner in B. R. and C. P., &c." *Held*, sufficient.

The copy of the by-law filed was under the seal of the municipality, and sworn to have been received from the clerk, and opposite the seal was the signature, "M. Flanagan. City Clerk," with the words, "A true copy," above. *Held*, sufficiently verified.

Held, also, that on the affidavits, stated below, it sufficiently appeared . that the applicant was a resident of the City of Kingston.

Adam Crooks, Q. C., obtained a rule calling on the corporation of the City of Kingston to shew cause why

(a) See *Cobbett v. Warner*, L. R., 2 Q. B. 108; reported since this judgment was given. The rule is there laid down, that where a plaintiff having failed in an action brings a second action for substantially the same cause, unless he satisfy the Court that a real probable cause of action exists, the proceeding is so *prima facie* vexatious and harassing that the Court will stay the second action until the costs of the former action have been paid.

section 48 of their by-law, passed on the 21st of June, 1864, entitled A By-law to regulate the public market of the City of Kingston, should not be quashed with costs, on the following grounds: 1. That such section is in excess of any authority conferred by law on said corporation. 2. It is not within the powers conferred on said corporation by the 8th sub-sec. of section 294, of ch. 54 Consol. Stat. U. C., or any other clause or sub-section of that act. 3. Because it assumes to order that all produce, articles, commodities, and things brought to the market for sale, must before being sold be offered for sale at the proper market place. And lastly, because it assumes that market toll must be paid on articles, commodities or things, before they are offered for sale in any of the public streets, houses, or within the limits of the city.

On the application he filed an affidavit of the applicant, who was styled in it as "of the City of Kingston, in the County of Frontenac, Esquire," and the first paragraph stated that he was "a resident in the City of Kingston," and that he obtained the by-law attached to his affidavit from Michael Flanagan, the City Clerk of the said City of Kingston, and that the seal affixed thereto was the seal of such corporation of Kingston. The affidavit was sworn before C. F. Gildersleeve, "at the City of Kingston, in the County of Frontenac," who styled himself in the jurat "a Commissioner in B. R. and C. P., &c., for the said county." The by-law at the end was signed, "M. Flanagan, City Clerk," and opposite the name was the seal of the corporation, and above the signature of the clerk the words "A true copy."

The 48th section of the by-law was: "That farmers or any other persons bringing produce, articles, commodities, or things, for sale to this market, if found or detected selling or offering for sale the same, or any part thereof, in any of the public streets, lanes, or within the city limits, to butchers, hucksters, vendors, or other persons, on their way to the market, or without having paid market toll, and before first offering said articles, commodities, or things, for sale at the proper market place, shall be deemed guilty of

an infraction of this by-law, and shall be subject to the penalty in such case made and provided herein." And by the 60th clause of the by-law, any person guilty of an infraction of the by-law was liable to be fined not more than \$50, nor less than 50 cents, and costs, to be levied, &c., and in default of payment to imprisonment for not more than twenty-one days.

Read, Q. C., shewed cause, and took several preliminary objections. 1. That the affidavit filed was not entitled in this Court, and that the jurat did not shew it was sworn before a commissioner of this Court. 2. That the copy of the by-law was not duly certified, the words "A true copy" being insufficient, without some form of certificate. 3. That it did not appear from the affidavit that the applicant was a resident of the City of Kingston. He cited *Hirons and The Municipal Council of Amherstburgh*, 11 U. C. R. 458; *Babcock and The Municipal Council of Bedford*, 8 C. P. 527; *Bogart v. The Town Council of Belleville*, 6 C. P. 427; *Hodgson and The Municipal Council of York and Peel*, 13 U. C. R. 268; *Osborn v. Tatum*, 1 B. & P. 271; *Fisher v. The Municipal Council of Vaughan*, 10 U. C. R. 492; *Baker v. The Municipal Council of Paris*, 10 U. C. R. 621.

Crooks, Q. C., supported the rule, citing *Lush's Practice*. 875; *Perse v. Browning*, 1 M. & W. 362; *White v. Irving*, 2 M. & W. 127; *Frazer and The Municipal Council of Stormont*, 10 U. C. R. 286; *Grierson and The Municipal Council of Ontario*, 9 U. C. R. 623; *Scarlett and the Corporation of York*, 14 C. P. 161.

MORRISON, J., delivered the judgment of the Court.

As to the preliminary objections, the cases of *Frazer and the Municipal Council of Stormont* (10 U. C. R. 286), and *Murphy v. Boulton* (3 U. C. R. 177), dispose of the first.

As to the second, it is sworn that the printed copy of the by-law filed was received from the clerk of the corporation. Attached to it at the end is the seal of the municipality, which is also sworn to, and opposite to it is placed the signa-

ture of the city clerk, and his title of office, with the words, "A true copy." We think it is sufficiently verified, and, as said by Sir John Robinson in *Fisher v. The Municipal Council of Vaughan* (10 U. C. R. 495), "If this were not a true copy of the by-law, that could easily be shewn on the other side."

With respect to the third objection, it appears to us that the statement in the affidavit that the applicant is a resident of Kingston, coupled with the previous statement that he is of the City of Kingston, in the County of Frontenac, is quite sufficient.

Then as to the main question, we can have no doubt that the corporation has exceeded the powers given by the Municipal Institutions Act, in passing the 48th section of this by-law. In *Fennell and the Corporation of Guelph* (24 U. C. R. 241), which was not referred to in the argument, this Court quashed so much of a by-law as restrained the sale of meat, fish, poultry, eggs, &c., within the Town of Guelph, at any place but the public market, without first having paid the market fee thereon; and also because it prohibited the sale of poultry, eggs, cheese, &c., within the municipality at any other place but in the market, no power being given to regulate the place of sale of such articles.

The by-law now before us makes no distinction. It subjects to a penalty any person whatever selling or offering for sale to any other person any produce, articles, commodities or things, within the city limits, without having paid market toll, or before first offering them for sale at the proper market-place.

That part of sec. 294 of the Municipal Act which relates to markets, and under the provisions of which this corporation has assumed to act, gives by the 8th sub-section power for preventing or regulating the sale of certain specified articles by retail in the public streets, and by the 10th sub-section power for regulating the place and manner of selling and weighing other specified articles, and by the 9th sub-section for preventing or regulating the buying and selling of

articles or animals exposed for sale or marketed in the open air.

The statute gives no authority for the passing of a by-law of so wide and general a character as the one now in question, or containing such conditions as it does. The provisions of the statute are specific and limited, and the by-law should be restricted in its operation to the purposes and articles mentioned in the different sub-sections, and by doing so the very proper object the municipality had in view would have been effected.

As it is, they have exceeded their powers, and the by-law must be quashed with costs.

Rule absolute.

KINLOCH V. HALL.

Costs—Issues in law and fact—C. L. P. A. Secs. 316, 324, 328.

In an action on the case, the plaintiff had judgment on demurrer to some of the pleas. He afterwards obtained a verdict for 1s. damages on the issues in fact, and a certificate for costs was refused.

Held, that under C. L. P. A. sec. 316, he was entitled to his full costs of the demurrer, and that sec. 328 did not apply.

C. S. Patterson obtained a rule calling on the plaintiff to shew cause why the Master should not revise his taxation of costs of the demurrer in this cause, and tax the same on the scale of the Division Court, and not on the Superior Court tariff; and also why the plaintiff's attorney should not deliver to the defendant's attorney the *Nisi Prius* record in this cause, in order that the plaintiff might enter judgment herein; or why the defendant in default thereof might not enter judgment, for the purpose of setting off his Superior Court costs against the Division Court costs.

From the affidavit filed on the application it appeared that this was an action on the case brought against the defendant as Sheriff for an escape: that in 1864 the defendant pleaded several pleas, to some of which the plaintiff demurred, and that the demurrers were disposed of in Easter Term of that

year, and judgment given upon them for the plaintiff (a) and the issues in fact were tried at the Spring Assizes in 1865, and a verdict rendered for the plaintiff and one shilling damages (b): that a certificate for costs was refused by the learned Judge who tried the cause; that no taxation of costs on the demurrer took place until the 7th of August last, when a bill of costs (namely, the costs of the demurrer upon which the plaintiff had judgment) was taxed by the Master upon the scale of the Superior Court tariff, at the sum of £15, as appeared by the master's *allocatur*..

Robert A. Harrison shewed cause, citing *Kingan et al v. Hall*, 23 U. C. R. 503; *Reed v. Shrubsole* 7 C. B. 630; *Gregory v. Duke of Brunswick* 3 C. B. 481; *Taylor v. Rolf*, 5 Q. B. 337; *Dunston v. Paterson*, 5 C. B. N. S. 267; *Cross v. Waterhouse*, 23 U. C. R. 590; *Poole v. Grantham*, 7 M. & G. 1030; *Mayor of Macclesfield v. Gee*, 13 M. & W. 470; *Abley v. Dale*, 11 C. B. 889.

C. S. Patterson supported the rule, and cited *Frean v. Sargent*, 2 H. & C. 293; *Wigens v. Cook*, 6 C. B. N. S. 784.

MORRISON, J., delivered the judgment of the Court.

In *Cross v. Waterhouse*, (23 U. C. R. 590) this Court determined that in an action within the provisions of the 324th section of the C. L. P. Act, where the plaintiff recovers less than \$8, and no certificate is granted as provided for by that section, the defendant is not entitled to set off or recover costs against the plaintiff under the 328th section, section 324 disentitling a plaintiff to recover in respect of such verdict any costs whatever.

This is a case within the 324th section. In *Cross v. Waterhouse* the plaintiff recovered a verdict and one shilling damages. Here the plaintiff had a like verdict, but prior to the recovery of the verdict he had judgment given for him on demurrer; and the question is, although the plaintiff is deprived of costs in respect of the verdict, is he entitled to the costs of the demurrer on the superior scale?

(a) See *Kingan et al v. Hall*, 23 U. C. R. 503.

(b) See *Kinloch v. Hall*, 25 U. C. R. 141.

Our decision must depend upon the effect of the 316th section of the C.L.P. Act, which enacts, "In case judgment be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour the judgment is given shall also have judgment to recover his costs in that behalf;" and whether, with regard to such costs, section 328 has any application.

It is quite clear that, under the 316th section, if there had been a verdict for the defendant the plaintiff would nevertheless have been entitled to a judgment to recover his full costs on the demurrer, and it appears that where a juror had been withdrawn, (the effect of which is that each party pays his own costs: *Stodhart v. Johnson*, 3 T. R. 657,) yet the Court in *Bentley v. Dawes* (10 Ex. 347), held under the stat. 3 & 4 Wm. IV., C. 42 s. 34, which contains the same provision as our 316th section, that the plaintiff had a right to the costs of a demurrer previously decided in his favor, irrespective of the determination of the suit, and independently of an assessment of damages, the words of the statute being that the should have judgment to recover his costs in that behalf.

Section 324 only deprives the plaintiff of costs in respect of the verdict; it does not affect the costs of a demurrer adjudged in favour of the plaintiff, which costs are irrespective of the finding of the jury. It is therefore, we think, clear that the plaintiff is entitled to his full costs on the demurrer, unless he is deprived of them by the 328th section of the C. L. P. Act. That section contemplates a trial and a verdict for an amount within the competence of either of the inferior courts, and provides that in that case the plaintiff shall have only the costs of such Inferior Court, unless the Judge shall certify as therein mentioned; and if he does not so certify, then, in that event, the defendant shall be entitled to set off a portion of his Superior Court costs against the verdict and plaintiff's Inferior Court costs, and if they exceed the plaintiff's verdict and costs to have execution for the excess. Apply that section to the case before us. By the verdict in this

cause it appears to be a case within the competence of the Division Court, but by the operation of the 324th section the plaintiff is deprived of all costs in respect of the verdict, and is not entitled to even the Inferior Court costs ; further, it is not a case in which the Judge could have certified under section 328, to give full costs, if disposed to do so. These two circumstances, in our opinion, shew that section 328 cannot be applied to this case, or affect in any way the plaintiff's right to recover his full costs of the demurrer given to him by the 316th section, and that therefore the Master's taxation was correct.

Although such is the conclusion we arrive at, we cannot say that it is a satisfactory one. Much incongruity arises from the wording of the various sections referring to costs, and it would be well if the Legislature would amend the law and render it more consistent.

The rule will therefore be discharged, but, as the question is a novel one, without costs.

Rule discharged, without costs.

BICKLE V. MATHEWSON ET AL.

Action for money advanced—Plea, money stolen from defendant—Refusal by Court to determine facts.

Plaintiff sued for money advanced by him to defendants to purchase wheat for him, alleging that they had not purchased or accounted. Defendants pleaded, in substance, that the money, while kept unmixed with their own as the plaintiff's money, was stolen from them by persons unknown, without any neglect on their part. At the trial a verdict was taken for plaintiff, subject to the opinion of the Court whether the defendants were liable, with power to draw inferences of fact. The Court declined to assume the functions of a jury in determining, upon evidence wholly circumstantial, whether the money had been stolen, and directed a new trial, with costs to abide the event.

Remarks as to such defence, and the facts required to sustain it.

THE plaintiff sued, first, on a count for money advanced by him to defendants to purchase wheat for him, alleging that defendants had not purchased wheat, or paid or accounted to him. 2. For money had and received.

Defendants pleaded, in substance, that they received the

money to purchase wheat, to be applied for that purpose, as plaintiff's agents, and kept it unmixed with their own money in a safe place in their office, and as plaintiff's money ; and that whilst it was so deposited, and before it could be disbursed in purchases of wheat for the plaintiff, and before defendants were asked to account for it, it was stolen from them by persons unknown, without any carelessness or neglect on their part.

At the trial, at Toronto, before John Wilson, J., after the evidence had been given, it was agreed that a verdict should be taken for the plaintiff subject to the opinion of the Court, whether under the pleadings and evidence the defendants were liable ; with power to draw inferences and to amend &c.

Robert A. Harrison, for the plaintiff ; cited *Gore Bank v. Hodge*, 2 C. P. 359 ; *Jones on Bailments*, 1, 4, 17, 22, 118 ; *Angell on Carriers* 32, 40, 43, 76 ; *Addison on Torts*, 1st Ed., 274, 2d. Ed., 358-9 ; *Finucane v. Small*, 1 Esp. 315 ; *Hodgson v. Fullarton* 4 Taunt. 787 ; *De Rothschilds v. Steam Packet Co.* ; 7 Ex. 734 ; *Dansey v. Richardson*, 3 E. & B. 151, 171 ;

M. G. Cameron Q. C., for defendants, cited *Foster et al. v. The Essex Bank*, 17 Mass. 479 ; *Gore Bank v. Hodge*, 2 C. P. 359.

HAGARTY, J., delivered the judgment of the Court.

On the argument it was intimated to the counsel, that the Court was not willing to assume the functions of a jury in determining whether the evidence shewed the money to have been stolen as asserted by the plea, the evidence on that point being wholly circumstantial and involving such an enquiry as the Court would not consent to withdraw from the decision of a jury.

We thought it possible that we might be able to see our way to a decision of the case without considering the question of felony. But an examination of the authorities convinces us that the case must be submitted to another jury, by whom must be decided the two substantial

questions, 1st, the terms on which defendants received the plaintiff's money, whether as specific moneys to be applied to a specific purpose, and always remaining the property of plaintiffs, as insisted on by defendants, or whether they merely stood to each other as ordinary debtor and creditor, without any claim to the specific money advanced, and the money when advanced becoming the defendants' money, as the plaintiff contends; and if this question be answered in defendants' favour, then whether the defence of the moneys being stolen under the circumstances set forth in the plea is made out.

The law is very fully discussed in *Gore Bank v. Hodge* (2 C. P. 359) in the very elaborate judgments of Sir James Macaulay and of Sullivan, J., and an almost exhaustive review of the authorities up to that time (1852).

Macaulay, C. J., says: p. 379, "To render the plaintiffs liable to the loss (by theft) it should appear that the money stolen was, (to some definite extent at least), a portion of that specifically received and held for them; and not only so, but that it remained separate, or (if mixed) that it was at all events so far ear-marked as to be capable of separate identification, so that had plaintiffs claimed it as theirs before the loss, or in the event of defendant's death or insolvency, or of execution issuing against his moneys, or the like, it could have been distinguished by him, or as against his creditors or representatives, as being the plaintiff's money and *property*."

Sullivan, J. says, p. 389, "The property can be followed as long as it can be traced. It will make no difference in law, as indeed it does not in reason, into whatever form different from the original the change may have been made, whether it be into promissory notes or other securities, or into merchandize, or into stocks, or into money. *The right only ceases when the means of ascertainment fail.*"

The cases cited amply warrant this view of the law. *Taylor v. Plumer* (3 M. & S. 562) is considered a leading authority, and may be referred to on that part of the evidence on which much stress was laid by the plaintiff's counsel—namely,

the changing into silver of some of the bank bills received from the plaintiff. In all the cases, or most of them, it is the original owner of the goods or money seeks to maintain his special property in them against the tortious act of defendants, the agent or bailee, or the creditors or assignees of the latter.

Lord Ellenborough says, p. 575, "The product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money and mixed and confounded in a general mass of the same description. *The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i. e., as predicated only of an undivided and undistinguishable mass of current money.*"

Lord Mansfield in *Howard v. Jemmet*, (3 Burr. 1369) in the case of a bankrupt executor, holds that the commissioners cannot seize the specific effects of his testator, not even in money which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself. *Tooke v. Hollingworth*, (5 T. R. 225) is also a strong authority to the same effect.

As the case has to be submitted to another jury, it may be as well that we should abstain from any expression of opinion as to the effect of the evidence on either branch of the case.

The very full examination of the law in the judgments referred to, especially in our Court of Common Pleas, and the numerous tests suggested as to the true ownership of the money at the time of the alleged loss, will enable the Court of *Nisi Prius* to present the questions to the jury in a clear shape for their decision.

New trial, costs to abide the event.

THE QUEEN V. WILLIAM LENNOX.

Tavern Licenses—Board of Commissioners of Police—Powers of, under 25 Vic. ch. 23.

By the first five subsections of sec. 246 of Municipal Act C. S. U. C., ch. 54, the municipal councils of cities had authority to pass by-laws for granting tavern licences, and declaring the conditions to be complied with by applicants, &c.; and by sec. 251 every person licensed was compelled to exhibit in large letters over the door the words, "Licensed to sell wine, beer, and other spirituous and fermented liquors," under a penalty of \$1. By 25 Vic., ch. 23, these subsecs. of sec. 246 were repealed as regarded cities, and the same powers substantially given to the Board of Commissioners of Police, but no express authority to pass by-laws.

Held, that even if all the powers of the City Council were transferred to the Commissioners, they clearly could not impose a higher penalty for not exhibiting the words prescribed, than provided for by sec. 251; and a conviction under their by-law imposing a fine of \$5 was therefore quashed.

Blevins obtained a rule calling on Alexander MacNabb, Esquire, Police Magistrate for the City of Toronto, and upon William Stratton Prince, to shew cause why a certain conviction made by the said Alexander MacNabb, on the complaint of the said Prince, dated the 22nd day of August last whereby the said magistrate convicted William Lennox of the alleged offence of having neglected to exhibit in conspicuous and legible characters over the door of his tavern the words, "Licensed to sell wine, beer, and other spirituous liquors," contrary to a certain alleged by-law in the conviction mentioned, should not be quashed on such terms as to this Court might seem fit, on the ground that such conviction is illegal and void; and on the grounds, 1. That there was no evidence taken at the hearing of the said complaint to support the said conviction. 2. That the said alleged offence is no offence in law—that there is no by-law or any law passed by competent authority to warrant the said conviction. 3. That the by-law referred to in said conviction is not in accordance with law; the Board of Commissioners therein referred to had no authority to make such by-law, and the fourth section thereof is in excess of their authority. 4. That the formal conviction drawn up by the said magistrate is in point of law defective, illegal and void.

The rule was granted on reading the writ of *certiorari*,

the return thereto, and the affidavits filed. The conviction was in the words following:—

“Be it remembered, that on the 21st day of August, A.D. 1866, at the Court House in the County of the City of Toronto, William Lennox is convicted before the undersigned, one of Her Majesty's Justices of the Peace in and for the said County, for that the said William Lennox, being a licensed tavernkeeper within the said city, did not on the 25th day of July, 1866, exhibit over the door of his tavern in the said City of Toronto the words, “Licensed to sell wine, beer, or other spirituous liquors,” contrary to a certain by-law of the Board of Commissioners of Police of the municipality of the City of Toronto, passed on the 25th day of February, 1863, and intituled, “By-law number one, to regulate the issue of licenses.” And I adjudge the said William Lennox for his said offence to forfeit and pay the sum of \$5, to be paid and applied according to law, and also to pay to William Stratton Prince, the complainant, the sum of \$2 85 for his costs in this behalf. And if the said several sums be not paid forthwith, I order that the same be levied by distress and sale of the goods and chattels of the said William Lennox; and in default of sufficient distress I adjudge the said William Lennox to be imprisoned in the common jail of the said city of Toronto for the space of thirty days, unless the said several sums, and all costs and charges of conveying the said William Lennox to the said jail, shall be sooner paid. Given under my hand and seal, &c.

“(Signed) A. MACNABB,
“P. M. and J. P.”

During this term *J. B. Robinson* shewed cause.

Blevins and *Robert A. Harrison* supported the rule, citing *Moore v. Jarron*, 9 U. C. R. 233; *Hopkins v. Mayor of Swansea*, 4 M. & W. 640.

The statutes cited are referred to in the judgment.

MORRISON, J., delivered the judgment of the Court.

Prior to the passing of the statute 25 Vic., ch. 23, the Municipal Councils of Cities had authority, under the provisions of the first five sub-secs. of section 246 of the Municipal Act, to pass by-laws: 1. For granting tavern licenses, &c. 2. For declaring the terms and conditions required to be complied with, by an applicant for a tavern license, and the security to be given by him for observing the same. 3.

For declaring the security to be given by an applicant for a tavern license, for observing the by-laws of the municipality. 4. For limiting the number of tavern licenses; and 5. For regulating the houses or places licensed, the time the licenses are to be in force, not exceeding one year, and the sums to be paid therefor.

By the 25 Vic. ch. 23, sec. 1, these five sub-sections, as respects cities, were repealed, and by the second clause of that act it is enacted, "In every City the Board of Commissioners of Police shall have power, and it shall be the duty of the said Board, from time to time, while no prohibitory by-law, enacted and approved under the sixth sub-section of the said section, is in force in such city: 1. To grant certificates for tavern licenses, &c. 2. To determine the terms, &c. 3. To determine the security, &c. 4. To limit the number, &c.; and 5. To make regulations for the houses or places licensed, &c.—being powers similar to those contained in the repealed sub-sections of the Municipal Act, with this difference, that the City Councils were authorised to pass by-laws respecting these matters, while to the Board of Commissioners (by the 25 Vic.) that power was given directly to them, and it is declared to be their duty to exercise it.

By the 251st section of the Municipal Act it is enacted: "Every person who keeps a tavern," &c., and has a tavern license, shall exhibit on the door of such tavern, &c., "in large letters, the words, 'Licensed to sell wine, beer, and other spirituous or fermented liquors,' under a penalty in default of so doing of one dollar, recoverable with costs before any Justice of the Peace upon the oath of one credible witness, one half of which penalty shall go to the informer and the other half to the municipality."

We see no authority in the 25 Vic., ch. 23, conferring powers on the Board of Commissioners to impose penalties for infractions of or non-compliance with their regulations, or any authority for the conviction complained of.

It was pressed by Mr. Robinson that the 25 Vic. transferred the powers conferred upon the Municipality to the

Board, and gave the like remedies the municipality had for enforcing obedience to their regulations. Whatever may have been the intention of the framers of the act, it certainly does not give such powers or the remedies provided for by the 205th to the 209th sections (inclusive) of the Municipal Act, under the provisions of which sections the Police Magistrate apparently acted in making his conviction.

Assuming that the Commissioners had power to pass by-laws or regulations relating to the matters mentioned in the second section of the 25 Vic., and that a regulation for exhibiting the words mentioned in the convictions over the doors of taverns would be within the provisions of that section, yet the Legislature having had under its consideration the subject matter of such a regulation, as appears by the 251st section of the Municipal Act above cited, and having by that section created the duty, and on default imposed a penalty of one dollar, we do not think it was competent for the City Council previous to the 25 Vic., or the Board of Commissioners since, to say that the provision made by Parliament in that respect was inadequate for the purpose. We take it that neither the City Council nor the Commissioners could legally pass a by-law or regulation imposing a greater penalty than that which the statute had declared.

The Legislature, by specifically creating the offence and inflicting a penalty of one dollar, had taken the particular matter entirely to itself, and, as we may say, withdrew it from the cognizance or discretion of the Municipality and the Commissioners, and settled the law in that respect; and by so doing put it beyond the powers of either of these bodies to alter it, or, as in this case, to increase the penalty to five times the amount the Legislature thought sufficient.

We are therefore of opinion the conviction was not warranted, and that it should be quashed. As our judgment rests on the want of authority, it is unnecessary to notice the other objections taken in the rule.

Rule discharged.

WILLIAMSON V. THE GORE DISTRICT MUTUAL FIRE
INSURANCE COMPANY.

Insurance—Policy and application—Construction of.

Plaintiff insured with defendants \$3,400, of which \$1,000 was on his tannery and \$500 on the machinery in it, on an application valuing the tannery and fixtures at \$1,000, which was said to be the two-thirds of the actual value, but agreeing that in case of loss defendants should only be liable as if they had insured two-thirds of the actual cash value, anything in the policy or application notwithstanding. The application was referred to in the policy as forming part of it, and stated the promise to be to pay all losses or damage not exceeding the said sum of \$3,400. the said losses or damage to be estimated according to the true and actual value of the property at the time the same should happen. The building and machinery having been destroyed by fire, the jury found the total cash value of the former to be \$1,050, and of the latter \$750.

Held, that the plaintiff was entitled to recover only two-thirds of these sums.

THIS was an action on a policy of insurance against fire, dated 2nd February, 1864, on the plaintiff's two-story frame building on lot number 4, in the 2nd concession of Blenheim, occupied by the plaintiff as a private dwelling, \$1,500; on the furniture, &c., contained therein \$400; on the plaintiff's tannery and fixtures on the same lot, \$1000; and on the plaintiff's tools and machinery therein, \$500—aver-
ring that the tannery and fixtures, and the tools and machinery therein, were, while the policy was in force, destroyed by fire.

There were several pleas, on which the parties went to trial at the Woodstock assizes in November last, before Adam Wilson, J.

The jury found a verdict for the plaintiff, and that the total cash value of the building and fixtures was.....\$1,050
and “ of the machinery..... 750

\$1,800

and they found that the plaintiff was entitled to two-thirds of that value, and the verdict was entered for \$1,283, leave being reserved to the plaintiff to move to increase the verdict by the sum of \$300 and interest thereon from the 8th September, 1865, as the amount insured on the building, fixtures, and machinery, was \$1,500, and the jury found that the plaintiff's loss exceeded that sum.

The whole question arose upon a part of the application for insurance, dated 12th February, 1864, upon which the policy sued upon was issued by the defendants. In that application, which was a printed form containing blanks to be filled by the applicant, among other things, the following was contained :

“Tannery and fixtures \$1,000; estimated value, exclusive of land, \$2,300. The real property above specified is herein estimated by me at two-thirds of its value. Such estimate, however, is not to be conclusive on the Company; and should I be insured pursuant to this application, I agree that in case of loss by fire the Company shall only be obliged to pay as if they had insured two-thirds of the actual cash value of such property, anything contained in this application or the policy of insurance to the contrary notwithstanding.”

The policy, after setting out the property upon which the insurance was made, and the several sums insured upon each separate property, added, “Reference being had to the application of the said James N. Williamson for a more particular description, and as forming a part of this policy;” and stated the promise, according to the provisions of the act, to settle and pay to the assured “all losses or damages, not exceeding in the whole the said sum of \$3,400, which shall or may happen to the aforesaid property, by or by reason or by means of fire, during the time this policy shall remain in force; the said losses or damage to be estimated according to the true and actual value of the property at the time the same shall happen.”

There was nothing else bearing upon the question raised in the application or policy.

E. B. Wood obtained a rule *nisi* on the leave reserved.

Moss shewed cause. He referred to two American cases, *Fuller v. Boston Mutual Fire Assurance Co.*, 4 Metcalf 206, which he said was relied upon by plaintiff; and *Post v. Hampshire Mutual Fire Assurance Co.*, 12 Metcalf 555, on which the defendants relied.

Robert A. Harrison supported the rule, citing *Irving v. Manning*, 6 C. B. 391; *Angell on Insurance*, sec. 255 *et sequ.*; *Peele v. Merchants Insurance Co.*, 3 Mason 71; *McQuaig v. The Unity Fire Insurance Association*, 9 C. P. 85; *Dickson v. The Equitable Fire Assurance Co.*, 18 U. C. R. 246.

He contended this was a valued policy, and that the defence relied upon was not open upon any of the pleas.

DRAPER, C. J., delivered the judgment of the Court.

Taking the two instruments as one, we see clearly upon what it is that the parties are before us. The plaintiff contends that by the policy \$1,000 was insured upon the tannery, and \$500 on the machinery therein: that the verdict of the jury determines that the losses or damage by fire to each of these subjects of insurance is equal to the sum respectively insured on them, and that the true and actual value of each at the time of the loss was greater than the sum so insured; and therefore he should recover on the tannery the \$1,000, and on the machinery \$500. The defendants contend that the actual cash value of the tannery being only \$1,050, they are only obliged to pay as if they had insured two-thirds thereof, and are consequently only liable on the tannery for \$700. If so, the rule must be discharged.

We think it impossible to get over the language of the application, in which the plaintiff agrees that in case of loss by fire the defendants shall only be obliged to pay as if they had insured two-thirds of the actual cash value of the property, referring to the tannery and fixtures; and this statement follows his declaration, that in valuing this property he has estimated it only at two-thirds of its value. If indeed this statement of valuation had not been accompanied by the declaration that the liability of the defendants should only extend to two-thirds of its actual cash value, it might have been argued, perhaps successfully, that both parties had agreed to \$1,000 as being two-thirds of the value. We have looked at *Angell on Insurance*, sec. 255, *et sequ.*, and at the cases cited by Mr. Moss, and find no reason for

thinking this rule should be made absolute. In our opinion it should be discharged.

Rule discharged.

STEVENSON V. THE LONDON AND LANCASHIRE FIRE
INSURANCE COMPANY.

Insurable interest—C. S. U. C. ch. 93, sec. 53.

Plaintiff insured with defendants a house in his possession, which he had purchased, with the land on which it stood, as part of lot A, but which was afterwards found to be upon the adjoining lot, B., having been built there in consequence of an unskilful survey. The house having been burned, it was objected that having no title to the land he had no insurable interest; but

Held, otherwise, for under C. S. U. C., ch. 93, sec. 53, he had a right either to the value of his improvements or to purchase at the value of the land.

Quære, whether an insurance company with whom the actual owner of a house, without fraud or wilful misrepresentation, effects an insurance thereon, can set up the legal title of a stranger to the land on which the house stands, as a defence against the claim of the assured.

THIS was an action on a policy of insurance for \$400, effected by the plaintiff with defendants, upon a building described in the policy as owned and occupied by the plaintiff as a dwelling, in the City of Kingston. The declaration alleged a total loss by fire, and that the plaintiff at the time of making the policy, and thence until and at the time of the loss, was interested in the premises to the amount insured.

Plea, that the plaintiff was not before or at the time of the said supposed damage and loss, interested in the said building in the said policy mentioned as alleged.

At the trial, at Kingston, before Draper, C. J., a verdict was taken for the plaintiff for \$408, subject to the opinion of the Court, whether the evidence proved the plea, and whether it was open to defendants to raise such defence.

Britton, for the plaintiff, cited *Marks v. Hamilton*, 7 Ex. 323; *Richards. v. London and Liverpool Ins. Co.*, 25 U.

C. R. 400; *Cavell v. Prince*, L. R. 1 Ex. 246; *Phillips on Insurance*, 173, 175; Add. Con. 556, 594

Sir H. Smith, Q. C., for defendants, cited *Marshall on Insurance*, 788, 805: *Orchard v. The Aetna Ins. Co.*, 5 C. P. 445; *Ogden v. The Montreal Ins. Co.*, 3 C. P. 497.

The facts of the case are sufficiently stated in the judgment of the Court.

DRAPER, C. J., delivered the judgment of the Court.

There is a baldness in the evidence, which is submitted to the Court in place of a statement of facts, constituting the special case, and we have to assume as facts those matters which are set forth in the uncontradicted statement of the witnesses.

It appears, then, that on the 25th of February, 1863, the plaintiff, for valuable consideration, bought some land on which the house insured by the defendants stood. He purchased on the assumption that the land was part of lot 24, in the concession of the township of Kingston. It is the error in that assumption out of which the present dispute arises.

Recently there has been a judicial determination of the true boundary line which separates lot 24 from the Clergy block C, which lies to the east of and adjoining this lot 24, and according to this decision the land described in the plaintiff's deed is part of the Clergy block C, and hence the plaintiff has no title to it.

It further appears that the plaintiff entered into possession on making his purchase, and occupied the house insured until the spring of 1866, when it was destroyed by fire. The defendants admitted that they took a risk on this house while the plaintiff was in possession thereof.

According to the declaration the policy bears date on the 23rd of July, 1863, and the insurance is for one year from that date, but it has been renewed by the plaintiff's payment of the annual premiums. This is not denied, for the only plea is that at the time of the loss the plaintiff was not interested in the premises.

These are all the material facts to be elicited from the evidence; and the deed to the plaintiff, and the grant of block C, which were put in at the trial, are not set out as part of the special case. It was stated in the argument of the defendants' counsel that the question deciding the ownership had been decided before the last premium was paid, and that the plaintiff had notice of that decision. It may have been so, but it is not so stated in the evidence; but there was no proof that any proceeding had been taken to eject the plaintiff by the true owner of Clergy block C, nor that the plaintiff was a party to the suit or proceeding by which the true boundary line was established.

It was urged for the plaintiff, that if the defendants paid him the amount of his loss, they would be entitled to the benefit of and to sue in his name upon the covenants for title contained in the deed to him, and *Addison* on Contracts, 547, and the cases there cited, were referred to. We are not, for various reasons, at present prepared to adopt that view.

Cavell v. Prince (L. R. 1 Ex. 246), was also cited, as shewing by analogy that the defendants were in the situation of third parties who could not raise the question of the plaintiff's title to the land, which for all that appears has not been brought into legal question by any interested in it adversely to him. We doubt whether such a position is tenable in reference to this case, where the defendants have an undeniable right to dispute the interest of the plaintiff in the subject matter insured.

There is, however, a consideration not adverted to in the argument, upon which, after much thought, we have arrived at the conclusion that the plaintiff is entitled to the *postea*. My learned brother Hagarty drew my attention to the Consolidated Statute of U. C., ch. 93, sec. 53. It enacts, that in case of an action of ejectment being brought against a person who in consequence of unskilful survey has improved on land not his own, the jury at the trial shall assess damages for such defendant for any loss he may sustain in consequence of improvements made before the commence-

ment of the suit, and shall also assess the value of the land; and if a verdict be found for the claimant no writ of possession shall issue until the claimant has tendered or paid the amount of such damages, or has offered to release the land to the defendant, provided the defendant before the fourth day of the ensuing term pays or tenders to the claimant the amount assessed as the value of the land.

The defendants assert that the house stood upon part of Clergy block C, of which Dr. Lyster, as Rector of Kingston, is seised in fee, and that the plaintiff's sole title rests on the mistaken idea that the house insured is upon lot No. 24; that as a consequence the house never was the plaintiff's property, and therefore the plea is sustained.

The evidence of Mr. Nash, the surveyor, shews that the line between lot 24 and Clergy block C was in dispute, and has only recently been settled, though, as already noticed, there is no proof that any action has been brought against the plaintiff. On the evidence there seems no reason to doubt that the house was built on the wrong lot owing to an unskilful survey, which placed the eastern boundary of lot 24 wrongfully, and that the plaintiff purchased under that mistake. We take it that the assignee of the person who erected that house on the wrong land has the same right as if he had himself built it. The equity of the statute, and a consideration of the mischief to be remedied, apply to his case as much as to that of his vendor. In such case he has an alternative right, to be paid the value of the improvements as assessed by a jury before the true owner could evict him, or to purchase the land at the assessed value, whenever the true owner brings ejectment against him. If twenty years elapse without any such action, the plaintiff's insurable interest would be undeniable. But while he retains the land with the right given by the statute, we are of opinion he has an immediate interest in the house burnt down, and hence, as we conclude, the plea is not sustained. The dispute is not whether in his application for insurance he described the nature of his interest accurately

and truly, but whether at the time of the loss he had an insurable interest.

Other cases might be put, that of a disseisor, for instance—of an intruder on lands of the Crown, who on the expectation of being allowed to purchase erected a house—of a supposed heir who entered in ignorance that there was a party nearer in descent. In short, we cannot at present accede to the conclusion that an insurance company, with whom the actual occupier of a house, without fraud or wilful misrepresentation, effects an insurance thereon, can set up the legal title of a stranger to the land on which the house stands as a defence against the claim of the assured. It is, we believe, a novel experiment; we do not think it a creditable one; and in the absence of direct binding authority, it has no intrinsic merit to entitle it to success.

We think therefore the *postea* should be delivered to the plaintiff.

Judgment for plaintiff.

REGINA V. ESMONDE.

Attempting to commit a felony—Aiding such attempt—27-28 Vic., c. 19, s. 9.

The prisoner was convicted of unlawfully attempting to steal the goods of one J. G. It appeared that he had gone out with one A. to Cooksville, and examined J. G.'s store, with a view of robbing it, and that afterwards A. and three others, having arranged the scheme with the prisoner, started from Toronto, and made the attempt, but were disturbed after one had got into the store through a panel taken out by them. Prisoner saw them off from Toronto, but did not go himself.

Held, that as those actually engaged were guilty of the attempt to steal, the prisoner under 27-28 Vic., ch. 19, sec. 9, was properly convicted.

CRIMINAL CASE RESERVED.

The prisoner was indicted, for that he, on, &c., at, &c., together with three other persons named, did unlawfully attempt the money, goods and chattels, of one J. G., then in the store of the said J. G., feloniously to steal, take, and carry away.

At the trial, at Toronto, before John Wilson, J., evidence was given by an accomplice that the prisoner went with him to Cooksville to see a store: that the prisoner went in to buy something, to see how it could be got into; after he came out he told witness that there would no trouble in getting in, and that it would pay, that all the tools required were a bit and a jemmy, and told witness where they could be procured: that they discussed the matter several times, and arranged for a day to go from Toronto to Cooksville, and the means of conveyance, &c.: that the witness and three companions started from Toronto in a buggy some days after; prisoner saw them off, but did not accompany them. The others went out, and at night made the attempt, taking out a panel of the door; one got in and took down the bars. It seemed the attack was expected, and as witness was striking a light a shot was fired from the inside, and they all ran off, and were arrested next day in Toronto. The subject of robbing a store in Cooksville was discussed between them before this night.

Witnesses were called for the defence, who admitted being concerned in and having been convicted of this attempt.

Robert A. Harrison, for the prisoner, objected that an indictment would not lie for counselling a felony unless a felony was committed: that there was no evidence to connect the prisoner with the attempt; he was an accessory only, and was not so charged here: that the 27-28 Vic., ch. 19, sec. 9, was not applicable.

The prisoner was convicted, and the learned Judge reserved the question whether the conviction could be sustained

J. H. Cameron, Q. C., for the Crown.

Robert A. Harrison, for the prisoner.

HAGARTY, J., delivered the judgment of the Court.

The act referred to at the trial and relied on by the Crown, 27-28 Vic., ch. 19, sec. 9, reads thus:

“Whosoever shall aid, abet, counsel or procure the com-

mission of any misdemeanor, whether the same be a misdemeanor at common law, or by virtue of any act, passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender."

The evidence, believed as it was by the jury, would, we think, warrant the charge that the prisoner "aided, counselled, and procured," the doing of the act of attempting to steal the goods of J. G. in the store. Had the felony been completed, sec. 2 of the same act would have rendered the prisoner, as an accessory before the fact, liable to have been indicted as a principal felon.

We have no doubt that there was evidence on which the jury could properly convict those actually engaged in effecting the entrance into the store with having done so with intent to steal; and that such attempt, with such intent, is a misdemeanor. The statute seems clear, that if the prisoner was accessory before the fact he could be indicted, as he has been, as if personally present.

No objection is taken to the sufficiency of the indictment, as charging an attempt to commit a felony.

Conviction affirmed.

BANK OF UPPER CANADA V. OWEN.

Venue—C. S. U. C. ch. 54, sec. 38.

A venue of the "United Counties of Huron and Bruce, To wit." *Held*, bad on demurrer.

THE venue in the margin of the declaration was, "United Counties of Huron and Bruce, To wit."

Demurrer, that there is no legal or proper statement of venue, as it should be laid in the proper county of the union.

There were other grounds, which were abandoned on the argument. See note *a*, at the end of the case.

S. Richards, Q. C., for demurrer, cited *Nelson and Nassawega Road Co. v. Bates*, 4 C. P. 281.

C. Robinson, Q. C., contra, cited *Plaxton v. Smith*, 1 P. R. 228; *Paton v. Cameron et al.*, 21 U. C. R. 364; Ch. Arch. Prac., 12th ed. 228; *Stephen* on Pleading, 6th ed. 223.

HAGARTY, J., delivered the judgment of the Court.

Section 38 of our Municipal Act directs, that in the case of united counties, the venue "shall be laid in the proper county of the union (naming it), and describing it as one of the united counties of ———, and in such case the jury for the trial of any issue, civil or criminal, or the assessment of any damages, shall be summoned from the body of the united counties."

This is a very plain and explicit direction, and we see no reason why the parties should disregard it as unnecessary.

In the *Nelson and Nassagawega Road Co. v. Bates* (4 C. P. 281), a precisely similar objection was taken on demurrer to a declaration and held fatal. The statute then governing the case, 12 Vic., ch. 78, sec. 7, was cited. We cannot see any substantial difference between this and the section 38 of the present Municipal Act.

Sir J. Macaulay said, "This seems explicit enough, and shews the present venue to be informally laid, though probably quite sufficient after verdict or judgment by *nil dicit*.
* * * I do not see that we can, in the face of the terms of the statute, hold a venue of the united counties sufficient in form, because the jury are to come from both, when the same act says the venue shall be laid in the county by name, which may be united to other counties."

This decision was made during the existence of special demurrers, but we do not feel at liberty, even since their abolition, to hold that a positive statutable direction in a matter of venue has therefore ceased to be obligatory, especially when we find the enactment to be several years after the Common Law Procedure Act.

The objection is wholly technical, and either party could have required an amendment at a trifling expense. The defendant took other exceptions which he felt bound to abandon. (a)

We think there must be judgment for the defendant, with leave to amend on payment of costs.

Judgment for defendant.

LOVEKIN V. PODGER.

Trover—Evidence of conversion.

The plaintiff sent to his agent, J., two boxes of trees and roots, made up in bundles addressed to various purchasers. They went by steamer to defendant, a forwarder, at Powell's Landing, where they arrived on Saturday, 5th May, and were taken from the boxes by defendant, and some of them delivered to the persons to whom they were addressed, who called for them. On Wednesday a person was sent by J. to take and deliver them, and on Thursday J. himself called. Many of the trees were injured, and the evidence was contradictory as to the state in which they arrived, and as to whether this injury was caused by defendant's treatment of them, or whether it was necessary, as he alleged, to open the boxes and deliver them without delay. The plaintiff having brought trover—

Held, that whether defendant had been guilty of negligence as a bailee or not, he had done nothing which would in law amount to a conversion; and a verdict for defendant having been set aside in the County Court, the judgment was reversed.

APPEAL from the County Court of Victoria.

Trover.—Pleas,—not guilty, and not possessed.

It appeared that the plaintiff, a nursery man in Newcastle, sent two boxes containing trees and roots to one Jones, his agent, near Fenelon Falls, to be distributed to some

(a) The declaration was against defendant Owen, stating that he had been summoned, together with one T. R., and one W. R., as to whom the plaintiff had entered a *nolle prosequi*. The first count was on a note made by T. R., payable to Owen, endorsed by Owen to W. R., and by W. R. to plaintiffs; the second count on a note made by Owen payable to T. R., who endorsed to W. R., who endorsed to plaintiffs. The ground of demurrer abandoned was, that the action was originally commenced against the defendants jointly, as appeared by the declaration, and that the discharge of one was a discharge of both.—See *Bank of Upper Canada v. Lizars*, 11 C. P. 179.

customers. They came by the steamer *Ogemah* to defendant, a forwarder at Powell's Landing, on Saturday the 5th of May. There was no regular wharf, and the landing was difficult. The boxes were slid along a gangway to the land, and some of them put in a stable of the defendant's, nearer the landing than his storehouse. The trees were in bundles, addressed to various purchasers. Jones swore that he had arranged for one Fitzgerald to distribute the trees, and wrote to him. The letter did not reach him till Tuesday, and on Wednesday he went to the defendant's.

Some five days after their arrival Jones went to defendant's, and found the boxes open and the trees taken out, and seven or eight bundles lying on the floor of the stable. They were quite spoiled from exposure. He said they should have been left in the boxes. Defendant told him he had delivered some bundles to people who had called for them, whose names were on them. The witness said the bundles should have been distributed by Fitzgerald, and notes or cash taken for the price from the different parties: that the defendant had taken no notes, and had only a few dollars in cash, and had kept no account of the deliveries: that the plaintiff had derived no benefit from the arrangement.

For the defence, it was proved that it was necessary to open the boxes to get them up from the landing to a place of safety. A witness who saw them opened said there was no straw in the boxes, and the trees were in bad condition. They were brought up by defendant's team. Some persons came and got the bundles addressed to them. One person paid for his. All but five or six bundles were said to have been so delivered.

It was objected that there was no evidence of a conversion; also that the property was in the respective vendees, and not in the plaintiff. These objections were overruled, and the jury were told to give damages for the whole of the trees: that the boxes being addressed to Jones, defendant opened and disposed of them without getting notes or money, and this was a conversion of the whole, the defendant's act depriving the plaintiff of his property, without anything to shew for it: that the plaintiff's bargain was to have

money or notes, and defendant's act was unauthorized and wrongful.

The jury found for the defendant.

In the ensuing term a rule to set aside the verdict as perverse was made absolute, costs to abide the event; and the defendant appealed.

J. A. Boyd, for the appellant, cited *Heald v. Carey*, 11 C. B. 977; *Coombs v. Bristol and Exeter R. W. Co.*, 3 H. & N. 510; *Chinery v. Viall*, 5 H. & N. 288; *Duff v. Budd*, 6 Moore 469, 3 B. & B. 182; *Nelson v. Macintosh*, 1 Stark. 237; *Drake v. Shorter*, 4 Esp. 165; *Crouch v. Great Northern R. W. Co.*, 11 Ex. 756; *Stephenson v. Hart*, 4 Bing. 476.

Hector Cameron, contra, cited *Burroughes v. Bayne*, 5 H. & N. 296, per Martin, B.; *Addison on Torts*, 269, 271.

HAGARTY, J., delivered the judgment of the Court.

If the motion for a new trial were before us, knowing nothing of the case beyond what appears in the learned Judge's notes, or of the weight to be attached to any particular part of the evidence, we should have certainly declined to interfere with the finding of the jury. It could only be on proof of acts amounting to a conversion that the plaintiff could recover, and we hardly agree with the direction given to find for the plaintiff as on a conversion clearly proved.

We think a jury might well fail to see proof of anything more than an honest desire on defendant's part as a warehouseman to do the best he could for the owner in regard to a quantity of perishable goods, by delivering them as rapidly as possible to the different owners to whom they were addressed, especially when, in the opinion of defendant's witnesses, the goods were on their arrival in an unsafe state, and badly packed, &c.

We think it would have been right to have left the case to the jury with that view of the facts plainly laid before them, with a direction that if they adopted that conclusion from the evidence their verdict should be for the defendant.

If it had been necessary to open the boxes for the purpose of lightening the weight and bringing the goods into a place of safety (as some of the evidence shewed), such an act would not be a conversion, nor would opening the boxes not with a view of determining the bailment, or in any way meaning to interfere with the owner's dominion over them, but with an honest purpose of protecting not of injuring the plaintiff's interests, be in our opinion a conversion for which this action would lie.

Maule, J., says in *Heald v. Carey* (11 C. B. 993), "There is no doubt that a negligent dealing by a bailee with goods is not a conversion; and there is equally no doubt that a bailee is not liable for a conversion arising out of a negligent dealing with the goods by him, but which is not an act participated in by him. He may be liable to an action of another description, but not to an action of trover, which only lies where some dominion is asserted by the defendant over the chattel which is the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is to a certain extent guilty of a conversion." Cresswell, J., says, "There is no conversion, no exercise of dominion over the goods by the defendant, except as the agent of the real owner."

During the argument Maule, J., puts a case (p. 986), "Suppose a horse being near a ferry, and the ferryman, imagining (contrary to the fact) that the owner of the horse wanted it ferried over, takes it on board, and the horse is accidentally drowned on the passage—would that be a conversion?" To which Cresswell, J., adds, "At what period?"

The case of *Syeds v. Hay* (4 T. R. 264), relied on for some expressions of Buller, J., is distinguishable. He says, "If one man, who is entrusted with the goods of another, put them into the hands of a third person *contrary to orders*, it is a conversion." He adds afterwards, "And this is a deliberate act, it being done contrary to the orders of the owner, and therefore distinguishable from the case put at the bar of a misdelivery of goods, merely owing to a mistake."

In this case it seems that goods of this kind from the plaintiff's had been previously sent in the same manner to defendant's storehouse at the Landing. Every bundle had its address attached to it. No person attended on the plaintiff's behalf from Saturday, the day of arrival, until Wednesday, when Fitzgerald came, and Thursday, when Jones arrived.

Michie, one of the persons to whom a bundle was addressed, swore that he had ordered trees by the 1st of May, but they had arrived late, some days after; he attended on the Saturday. He proved the necessity for opening the boxes, and that he told defendant if plaintiff's agent were there he would not take them on account of the state they were in; that he took his bundle and put them in the earth on the same day, but only a few lived; his bargain was to pay at a future day.

We hardly see how it can be considered that there was any conversion in such a case as to Michie's bundle, which may be taken as an illustration. There is no proof or suggestion that any actual damage resulted to the plaintiff from any of these deliveries, apart from the question whether the trees were or were not injured by the way they were treated; nor was it proved that defendant was aware that the trees were only to be delivered on payment by cash or note.

Another witness, Duggan, got his in the same manner on the same day, and planted them on Monday. They had nothing around them, and nearly all failed. A third witness (called by the plaintiff), got his on Wednesday. He asked defendant was he authorised to take a note; defendant said no, that he supposed the agent would be round in a few days and take notes. One McNeil paid four dollars to defendant. Nothing seems to have been pressed at the trial about this money, and defendant was proved to have paid \$4.92 to the purser of the boat for freight on goods.

Now in the cases proved the parties actually received and put their trees in the ground, some days earlier than they would have been enabled to do had defendant waited the arrival of plaintiff's agent.

It was a fair question on the evidence for the jury, whether the proceedings of the defendant had caused the injury to the trees, or the bad packing of the plaintiff's workmen. But the action was not for negligence by the defendant as a bailee of the goods; it must stand or fall on conversion or no conversion.

If the plaintiff's argument be correct, then if a warehouseman receives a number of boxes of fresh fish or fruit, which he knows would soon become entirely worthless, and he also knows that they are addressed in parcels to various persons in the neighborhood, and no person attends to receive or distribute them for the plaintiff; then, if in perfect good faith, and merely to protect the plaintiff's property from destruction, he open the boxes and deliver the parcels, he would be guilty of a conversion; or, in plainer language, he would be held to have appropriated the plaintiff's property to himself by the very effort he made to save the owner from a total loss.

Jones, the plaintiff's agent, says, "The goods for Fenelon Falls were always delivered to the defendant at that place. I understand that he collected his charges for his trouble." From whom, it may be asked, was defendant to collect his charges? Was it from the different owners of the bundles? This would indicate a privity between defendant as warehouseman and the owners. Would trover lie against each of the parties who took his bundle of trees from defendant without paying cash or giving a note? Take Hopkins' case. He wrote an order on the plaintiff to deliver certain specified trees for him at Fenelon Falls, for which (the order says) he will pay \$14.75 nine months from delivery. He received his bundle from defendant at the Falls. Would trover lie against him? We think not. There was no condition precedent as to giving a note. This order is put in as a specimen of the others. Other orders were given for trees, cash payable on delivery.

We do not see any evidence on which a jury could have safely found such a dealing by defendant with the plaintiff's property as to amount in the eye of the law to a conversion,

and we think, on the whole case, the plaintiff failed, and that the verdict was rightly found for the defendant.

If we could see any evidence or a balance of evidence as to conversion, we should not deem it right to interfere with the learned Judge's discretion in granting a new trial, and we adhere to the view expressed by us in a recent appeal from the County of Peterborough—*Harris v. Robinson* (25 U. C. R. 247).

But where we think the verdict right in point of law, and as a legal deduction from a set of facts on which (apart from the question of the injury by exposure) there was no real contest, we think it our duty to uphold the verdict and allow the appeal.

In *Heald v. Carey*, Jervis, C. J., says, "The question is whether, upon the evidence, the defendant was shewn to have been guilty of a conversion. It is admitted that that is purely a question of law."

This view is of course based on the assumption that there was no ground whatever in the evidence adduced on which any jury could be brought to believe that the defendant acted otherwise than in good faith for the interest of the plaintiff, or that he had any design to interfere with the plaintiff's dominion over his property, or to assume any right thereto on his own part.

See Lord Kenyon's comment on *Syeds v. Hay*, in *Youl v. Harbottle* (Peake 49); *Dufresne v. Hutchinson* (3 Taunt. 117), *Devereux v. Barclay* (2 B. & Al. 702), *Foulds v. Willoughby* (8 M. & W. 547).

We allow the appeal, and direct the rule below for a new trial to be discharged with costs.

Appeal allowed.

GOLDING V. BELLNAP ET AL.

Action on Replevin bond—Plea, return of the goods.

Declaration on a Replevin bond, by the Sheriff's assignee, alleging that B. the plaintiff in replevin, did not prosecute his suit with effect, and did not make a return of the goods, though such return was adjudged, and a reasonable time for making it had elapsed. Plea, that B. did make a return according to the condition, but that the plaintiff refused to accept the same.

Held, a bad plea, as answering only one breach, and therefore no bar to the plaintiff's recovery.

DECLARATION by the plaintiff, assignee of the Sheriff—that one Peter Bellnap had commenced an action of replevin in the County Court of the United Counties of Northumberland and Durham against the now plaintiff, for the taking and unjustly detaining of his goods and chattels to wit, &c., &c., and had delivered his writ of replevin in his said action to the said Sheriff to be executed; and thereupon the defendants, in pursuance of the Statute in that behalf, by their bond bearing date the 8th of June, 1865, became bound to the said Sheriff in the sum of \$450, to be paid to the said Sheriff, or his certain attorney, executors, administrators or assigns, subject to a condition, that if the said Peter Bellnap should prosecute his suit with effect and without delay against the now plaintiff, for the taking and unjustly detaining of his said goods and chattels, and should make a return of the said property if a return should be adjudged, then the said bond should be void, or else remain in full force and virtue. And the said Sheriff executed his said writ, and the said Peter Bellnap did not prosecute his said suit with effect, but failed so to do, and a return of the said property was in the said action adjudged to the now plaintiff; and a reasonable time for the said Peter Bellnap to return the same accordingly elapsed, yet the said Peter Bellnap did not make a return thereof; and the plaintiff was put to great costs and expense in defending the said action, and sustained great loss by being deprived of the said property, and the defendants did not pay such costs or make good such loss—whereby the said bond became forfeited to

the said Sheriff, who thereupon afterwards assigned the same by deed to the now plaintiff, according to the form of the statute in such case made and provided.

Plea, by each defendant separately, that within a reasonable time before this suit the said Peter Bellnap did make a return of the goods in the declaration mentioned, according to the condition of the said bond, yet the said plaintiff refused to take or accept of the same.

Demurrer to each plea, on the ground that the said plea does not answer the declaration, inasmuch as it does not in any way answer the breach assigned in respect of the condition to prosecute with effect.

C. S. Patterson and Spencer for the demurrer, cited *Mulvaney v. Hopkins*, 18 U. C. R. 174; *Perreau v. Bevan*, 5 B. & C. 284; 1 Wms. Saund. 195 *i*, 195 *k*; *Morgan v. Griffith*, 7 Mod. 380; *Harrison v. Wardle*, 5 B. & Ad. 153; *Jackson v. Hanson*, 8 M. & W. 477; *Turnor v. Turner*, 2 B. & B. 111; *Thomas v. Heathorn*, 2 B. & C. 477; *Eddison v. Pigram*, 16 M. & W. 137; *Clarkson v. Lawson*, 6 Bing. 266; *Phillips v. Price*, 3 M. & S. 180; *Bullen & Leake Prec.*, 2nd Ed., 383 note; 1 Wms. Saund. 28 *a* note 3; Ch. Arch. Prac. 12th Ed. 292.

Burns, contra, cited *Blagrove v. Bristol Waterworks Co.*, 1 H. & N. 386; C. L. P. A. sec. 104.

HAGARTY, J., delivered the judgment of the Court.

In an ordinary action this plea might perhaps be upheld on the authority of the case cited by Mr. Burns, *Blagrove v. The Bristol Waterworks Co.*, (1 H. & N. 386). Alderson B. says: "We think the plea constitutes a good answer to the second, but not to the other counts, and that there must be judgment accordingly." But it was held otherwise in *Eddison v. Pigram* (16 M. & W. 137).

The plaintiff could sign judgment as to the unanswered counts, and perhaps we may add the unanswered breaches, at least in a case in which there could be an interlocutory judgment signed.

This very peculiar action, however, suggests many difficulties. As noticed by this Court in *Bletcher v. Burn* (24 U. C. R. 265), a replevin bond is not within the statute, and damages are not assessed on breaches assigned; and it is not easy to see what course the plaintiff should take as to any substantial part of his declaration not met by the plea.

The only defence presented here is that Bellnap made or offered to make a return of the goods.

In *Perreau v. Bevan* (5 B. & C. 297), Holroyd, J., says: "The condition of the bond is broken and the bond forfeited, as well by not prosecuting the suit with effect as by a default of making a return of the distress on such return being adjudged, each part of the condition being independent of the other, and the bond forfeited by a failure in either. Though a return of the distress may have been actually made as well as adjudged, yet the avowant may and will still be damnified by reason of his costs of suit, where the distress so returned is not of sufficient value to pay him his costs as well as his arrears of rent."

In *Mulvaney v. Hopkins* (18 U. C. R. 175), the late Chief Justice says: "The defendants cannot relieve themselves from their bond, unless by proving that they have not broken the condition *in either respect*."

In 1 Wms. Saund. 195 *k*, note *q*., it is said, "Where the distress is for rent, and the avowant has judgment for a return, he may, after getting the replevin bond assigned, put it in suit against the obligors, and rely on the judgment alone as a breach of the condition to prosecute the suit with effect, without suing out, or averring in his declaration, any writ of *retorno habendo*, * * and without averring that the plaintiff in replevin did not make any return of the distress," citing 5 B. & C. 284, above referred to.

We have therefore a breach in the plaintiff's declaration wholly unanswered, and even if he joined issue on the plea, and was defeated thereon, it would seem that his cause of action is still complete and the bond forfeited. Only final judgment can be signed, and that only once of course. As

the plea stands, not confined to any particular part of the claim, it is certainly no bar to the plaintiff's right to recover the whole amount of his claim.

We think we must give judgment for the plaintiff on demurrer.

Judgment for Plaintiff

JONES V. SEATON.

Ejectment—Appearance by landlord—Entitling papers—Irregularity—Waiver.

In ejectment brought against A. and B., by consent of the plaintiff's attorney an appearance was entered for S. as landlord, A. and B. not appearing. The notice of trial was entitled as against A. and B., and notice was served on the plaintiff's attorney warning him that this would be objected to. The *Nisi Prius* record contained no appearance, but annexed to it was an appearance by S. as landlord. The plaintiff was allowed to enter this on the record, and took a verdict, defendant not appearing. On application to set aside the verdict, the plaintiff objected that the affidavits filed by defendant, entitled as against S. alone, were wrongly entitled, and that no Judge's order was shewn allowing S. to defend.

Held, 1. That the plaintiff was precluded from the last objection, for he had consented to S. appearing, and obtained leave to enter his appearance on the record—

2. That the plaintiff's own proceedings warranted S. in assuming that he was to appear alone, and that the affidavits objected to were therefore rightly entitled—

3. That the notice of trial was wrongly entitled.

The verdict therefore was set aside, the costs to be paid by plaintiff.

EJECTMENT for the south-west quarter of lot] 6, in the 5th concession of the township of London.

The writ was tested 24th February, 1866. The plaintiff claimed under an indenture of bargain and sale from Thomas Hornby and Isaac Hornby, heirs of the late Thomas Hornby.

An appearance was entered for the whole by John Seaton as landlord (no date given), Spice and Humphrey being the defendants named in the writ. He claimed title under a conveyance from Isaac Hornby.

The trial of this cause was put off at the Spring Assizes, 1866, on payment of costs, and it was again entered for trial at the last Middlesex Assizes, before Hagarty, J.

When the case came on, there was no appearance entered on the *Nisi Prius* record, as a part thereof, but annexed

thereto was an appearance by John Seaton as landlord, and upon the application of the plaintiff's counsel the appearance was formally entered on the record, excepting that there was no date to the entry. No one appeared for the defendant, and a verdict for the plaintiff was entered.

M. C. Cameron, Q. C., obtained a rule calling on the plaintiff to shew cause why a new trial should not be granted, because, 1st, no issue book or sufficient notice of trial was served for those assizes, there being no notice entitled in the cause: 2nd, On affidavit and merits.

The affidavit supporting the rule stated that by consent of the plaintiff's attorney an appearance had been entered for Seaton, and that the defendants named in the writ did not appear. It was sworn that two notices of examination, both of them entitled as against the defendants named in the writ, were served on the defendant's attorney. They were both dated on the 22nd October, 1866, and required the defendants to appear at the trial to be examined; and a notice of trial similarly entitled was also served, and the issue book delivered contained a copy of the writ of summons and of the appearance by Seaton. It was sworn that no other issue book, notice to attend for examination, or notice of trial was served, and that notice was served on the plaintiff's attorney of the defect with regard to the notice of trial, warning him not to proceed.

The affidavit also set forth that Seaton's title was under a deed dated 22nd July, 1861, from Isaac Hornby, devisee of the late Thomas Hornby: that a recent search into title disclosed that the memorial which had been registered of the will was defective, not shewing that it (the will) had been executed in the presence of two witnesses: that though various efforts had been made to obtain sight of the will, it had not been ascertained who had it: that the plaintiff was the nephew of an executor named in the will: that, on information and belief, Seaton had a good defence on the merits: that if the will could not be produced, secondary evidence of its contents could be procured.

The affidavit filed by the plaintiff in answer confirmed the foregoing statements respecting the notices, &c., served on defendant, and did not deny service on himself of notice of defendant's intention to avail himself of the irregularity. It referred to and stated conversations with the defendant's counsel, in which the latter spoke of being as ready for trial as he ever expected to be, and importing that the defence could not be sustained. It referred to Thomas Hornby's will, stating on information and belief that there was only one witness to it, but said nothing as to who had the will, or where it was, not denying however any knowledge about it, or whether probate was granted of it.

J. A. Boyd shewed cause, and before reading the foregoing affidavit of the plaintiff he raised a preliminary objection, that the affidavits filed for the defendant were wrongly entitled: that no Judge's order to let Seaton in to defend was put in or shewn, and if there had been an order for the landlord to be let in to defend, he should be joined with the other defendants. Subject to this objection he read the plaintiff's affidavit and argued against the rule. He cited *Peebles v. Lottridge*, 19 U. C. R. 628.

DRAPER, C. J., delivered the judgment of the Court.

We think the preliminary objection comes with an ill grace from the plaintiff. He consents that the appearance shall be entered for Seaton, and when that appearance is entered he adopts it, and attaches it to his *Nisi Prius* record, and having omitted to enter any appearance or defence on that record he obtains leave from the Judge at *Nisi Prius* to enter that appearance, and that only, as the appearance on which only Seaton appears; and with his record in that condition, omitting any notice of the defendants named in the writ, he takes a verdict against Seaton by default for not appearing. After this he cannot be heard to object that there was no Judge's order permitting Seaton to appear. And we think his own proceedings warranted Seaton in assuming that he was to appear in lieu of the parties named in the writ, who, as the affidavits shew, were only tenants of

Seaton, and not to appear jointly with them. *Peebles v. Lottridge*, (19 U. C. R. 628) as we understand it, in such a case warrants the title of the affidavits objected to, namely, treating Seaton as sole defendant.

Then we think the plaintiff's own proceedings irregular, in omitting the name of Seaton in the style of the cause in the notice of trial, for on the plaintiff's own shewing in adding Seaton's appearance to the record he was a defendant with those named in the writ, or a sole defendant, as he contends. It is very possible that if the learned Judge had been informed that the defendant did not appear because he would thereby waive previous irregularities in the plaintiff's proceeding, he would not have allowed him to cure so glaring an irregularity as entering a record on which there was no issue to be tried and no defendant appearing.

And on the merits, we think it reasonable they should be tried. The plaintiff's affidavit might surely have stated more than his information and belief respecting the defective execution of the will, for he, an attorney, would not have purchased from the heir-at-law when he must have known that a person professing to be devisee had previously conveyed the land, without making further enquiry.

We are of opinion the rule should be made absolute. The plaintiff must pay the costs of this application.

Rule absolute.

CLARK V. CHIPMAN.

Affidavits—Practice—Money Paid.

Affidavits impeaching the character for veracity of a deponent whose affidavit had been filed on moving a rule, were rejected.

Defendant owing one C. procured K. to give his note to C. for \$400, and got the plaintiff to give K. a mortgage by way of indemnity. K. having paid the money called upon the plaintiff, who being unable to pay gave K. an absolute deed of the land, which K. accepted in satisfaction. *Held*, that the \$400 for which the land was thus taken, might be recovered by the plaintiff from defendant as money paid.

On the contradictory affidavits, set out below, the Court refused to interfere on the ground of an alleged partnership between plaintiff and defendant.

COMMON counts for work, labour and materials, money, and account stated. Pleas: 1. Never indebted. 2. Payment. 3. Cause of action did not accrue within six years.

The case was tried at Brockville, in April, 1866, before John Wilson, J.

It appeared that there had been dealings between the defendant and one Coon, and that on the 26th of March, 1862, these parties, one Kilburn, and the plaintiff, all met together. Defendant owed Coon \$760, which was settled by Kilburn giving his notes to Coon for \$400 with interest at twelve per cent., the plaintiff and defendant their joint notes for \$300, and the defendant his own note for \$60.

Both plaintiff and defendant were to secure Kilburn in case of his paying the \$400, and the plaintiff and his wife joined in a bond to Kilburn conditioned to pay \$400, with interest at twelve per cent from the 26th of March, 1862. The plaintiff and his wife also gave a mortgage in fee to Kilburn for the same purpose, which, however, was not duly executed to pass the real estate of the wife. Afterwards, on the 5th of June, 1865, by indenture of that date, the plaintiff and his wife, in consideration of \$400, conveyed to Kilburn in fee the front part of lot No. 11, in the 6th concession of North Crosby. This deed was executed with the necessary formalities. Kilburn swore that the defendant told him it would be well for him to take the deed from plaintiff and his wife, and that he took this land in payment

of the \$400 intended to have been secured by the bond and mortgage, having paid Coon \$454, and still owing him a balance : that he held the plaintiff no further, and on receiving the deed had acquitted the plaintiff and his wife from the mortgage.

Upon the evidence given it was insisted, on the part of the defendant, that the plaintiff and himself had entered into partnership, and that what the plaintiff advanced was only his contribution to the partnership stock.

A non-suit was moved for, on the ground that the evidence did not sustain any of the money counts. On this point leave was reserved to move, and the case went to the jury on the question whether what the plaintiff gave was to secure or obtain an interest in the business. The jury, however, negatived this, by finding for the plaintiff and \$400 damages.

In Easter Term, *S. Richards*, Q. C., obtained a rule, pursuant to leave reserved, calling on the plaintiff to shew cause why a non-suit should not be entered, or for a new trial on the law and evidence, on the same ground—on the ground that the mortgage and deed were given by plaintiff and his wife as part of or part payment of the consideration for a partnership with defendant : that there was no payment of money at defendant's request ; and for surprise, as stated in affidavits ; and for the discovery of new evidence.

The defendant supported his application by a very long affidavit, detailing his connection and dealing with the plaintiff. For the purposes of this application the important parts were, a positive assertion that they were partners from the time of the giving the notes, &c., in March or April, 1862 : that he fully expected to prove this by the evidence of Coon and Kilburn, and was taken by surprise that they did not prove this ; and that he had discovered since the trial that the plaintiff had in 1862 admitted to one McGregor, a division court bailiff, that he was in partnership with defendant, and that in the same year he made a similar admission to one

Rogers, an innkeeper. McGregor made an affidavit stating the plaintiff's admission to him.

On the other side, the plaintiff made an affidavit explaining why he was induced to assist defendant, and denying any partnership unequivocally; and he produced an affidavit from Coon, corroborating those parts of the plaintiff's affidavit of which Coon had knowledge. Coon also swore, that defendant complained to him, that had the plaintiff gone into the business, he (defendant) would have been able to pay all the debt, referring to the \$300 signed by plaintiff and defendant. He produced other affidavits supporting his denial of a partnership, in one of which the deponent swore that he was told by defendant in 1865 that he never could get the plaintiff to go in as a partner, and the more he tried the more plaintiff kept off. In some of these affidavits the character of McGregor as a reliable witness was impeached.

The defendant then tendered a very long affidavit made by himself, and one by another person contradicting a particular statement contained in one of the affidavits filed by the plaintiff, and several affidavits in support of McGregor's character for veracity. The Court allowed these to be handed in, reserving the consideration of the propriety of receiving them at that stage.

During this term *Robert A. Harrison* shewed cause, citing *Barclay v. Gooch*, 2 Esp. 571; *Taylor v. Higgins*, 3 East 170; *Maxwell v. Jameson*, 2 B. & Al. 51; *Turney v. Dodwell*, 3 E. & B. 136; *Westropp v. Solomon*, 8 C. B. 345; *Alexander v. Vane*, 1 M. & W. 511; *Taylor v. Stray*, 2 C. B. N. S. 175; *Brown v. Jones*, 17 U. C. R. 50; *Allan v. Levesconte*, 15 U. C. R. 9; *Bullen & Leake* Prec. 2d Ed. 413, note. As to the affidavits, *Scott v. Scott*, 9 L. T. Rep. N. S. 456; *Fawcett v. Mothersell*, 14 C. P. 104; *Regina v. McIlroy*, 15 C. P. 116.

S. Richards, Q. C., contra, referred to *Maxwell v. Jameson*, 2 B. & Al. 51; *Moore v. Pyrke*, 11 East 52.

DRAPER, C. J., delivered the judgment of the Court.

We think that affidavits going merely to the credibility of a particular deponent whose affidavit has been put in, if receivable at all, are of very little value. Such testimony is most proper for a jury, for it relates to an element of inquiry most important for them in deciding questions of fact, but the decision of such questions is not, strictly speaking, the province of the Court. If a fact sworn to on one side is positively denied on the other, it is, so far as the Court are concerned, put out of consideration, unless there be further matters so established that the Court can safely adopt them and apply them to the contradictory statements. But the impeachment of the veracity of a deponent is very different, and as at present advised we do not see how the Court can give weight to it. If allowed, the deponent will claim to sustain his character, or the party who has adduced his affidavit will do so, and if the attack is proper, the defence must surely be so. We incline very strongly to the rejection of all such affidavits. On moving a rule, such affidavits could not be offered, and on shewing cause affidavits should, we think, be confined to statements of fact, either contradicting the facts relied on to sustain the rule, or alleging other facts which are adverse to its being made absolute. If impeaching the general character of a deponent on the other side was allowed, we think the books of practice would notice it. We have not found an allusion to such affidavits. In our opinion the affidavits offered by the defendant in reply should not be received, and those filed by the plaintiff impeaching the general reputation of McGregor should be taken off the file. It is not like impeaching the character of a witness who was examined at the trial.

With regard to the fact of partnership, the affidavits shew that the defendant only suggests he can prove some admissions made by the plaintiff, while the plaintiff sets up statements of defendant of a contrary character. No fact of partnership, no dealing, no course of business, is stated as newly discovered and to be proved. We see no sufficient ground in this to set aside the verdict.

In truth the whole question for our decision is whether the plaintiff gave any evidence sufficient to go to the jury of money paid for the defendant, and at his request.

Partnership being thus placed out of the question, the facts are that defendant owed Coon \$760 and procured Kilburn to give his own notes to Coon for \$400, part of that amount, and in order to get Kilburn to do this defendant procured the plaintiff to indemnify him by giving a bond and mortgage on land of his wife's. Kilburn paid upwards of \$400 to Coon, and called upon the plaintiff to fulfil his undertaking. The plaintiff being unable to pay, joined with his wife in an absolute conveyance of the land to Kilburn for the sum of \$400, which Kilburn accepted as a satisfaction and discharge, and acquitted him of all further liability on the bond or mortgage. The effect of this was to discharge the defendant from liability to Kilburn, who had to a greater amount relieved defendant from liability to Coon.

But it was objected that the plaintiff had not paid money, for which he was suing, and that there was no request on defendant's part to convey this land in fee, even admitting, which on the evidence it would be difficult to deny, that the bond and mortgage were given at his request.

As between the plaintiff and Kilburn, the land has represented and has paid \$400. Suppose the plaintiff had sold the land to Kilburn, and received \$400 as the purchase money, and on the same or the next day had returned the money to Kilburn in satisfaction of the debt, the objection as taken could not have arisen; and yet this is the spirit and effect of what has been done. If Kilburn had recovered judgment on the bond, and had issued a *fi. fa.* against the plaintiff's land, upon which this same land had been sold, and Kilburn had bought it and given credit on the execution, so as to discharge the plaintiff from \$400, no money would have been directly paid by the plaintiff, and yet in either case he would have relieved defendant from that sum. It was no voluntary unauthorized payment, but the result and consequence of the plaintiff's compliance with defendant's

request. If the conveyance of the land had been a mere security, it would have been otherwise, but it is an absolute conveyance accepted in satisfaction.

The case of *Barclay v. Gooch* (2 Esp. 571), seems to us to establish the principle that the acceptance by Kilburn of the land as satisfaction for the money due to him by the defendant, and thereupon acquitting the defendant of that debt, entitles the plaintiff to treat the transaction as money paid to his (defendant's) use. See also *Maxwell v. Jameson* (2 B. & Al. 55), where Holroyd, J., says: "The debt must have been extinguished, either by an actual or a virtual payment of money by the plaintiff to the defendant's use." In this case the effect is to discharge defendant from paying Kilburn.

Lewis v. Campbell (8 C. B. 541), establishes that there was in law a sufficient request, and as between the plaintiff and defendant the plaintiff has paid money, for he has relieved defendant from paying money to Kilburn, and necessarily, from his undertaking at defendant's request.

We think the rule should be discharged.

Rule discharged.

THE TRUSTEES OF THE FIRST UNITARIAN CONGREGATION OF TORONTO V. THE WESTERN ASSURANCE COMPANY.

Double Insurance—Construction of Policy—Extent of Liability.

Plaintiffs insured with defendants \$2000 on a building, and \$2000 on the furniture, and with another company \$2000 on the building and furniture together; and a loss occurred of \$1050 on the building, and \$878 on the furniture. The defendants' policy provided that in case of loss, the assured should recover from them only such portion thereof as the amount assured by them should bear to the whole amount assured on the property; and, under this, they contended that the other insurance must be treated as one for \$2000 on the building and \$2000 on the furniture, so that they would be liable only for one-half of the loss on each; but *Held*, that as the whole amount insured was \$6000, of which defendants had taken \$4000, they were liable for two-thirds of the loss.

ACTION on a policy of insurance for the sum of \$4000, of which \$2000 was insured on a building, and \$2000 on the

furniture and fixtures therein, alleging a loss on the building of \$1050, and on the furniture and fixtures of \$878, in all \$1928. There was another insurance with the British America Insurance Company for \$2000 on the building furniture and fixtures, jointly, and the plaintiffs claimed from defendants two thirds of the \$1928, being, as they contended, the rateable proportion which the sum assured by defendants bore to the whole amount insured on the property.

At the trial, at Toronto, before John Wilson, J., the defendants offered evidence to prove that, according to the usage of insurance companies on policies like those in the present case, the defendants would be liable only for one-half of the loss as between themselves and the other insuring company. This was rejected.

The two policies were admitted, and the loss as above mentioned.

In the policy of the defendants, dated 21st January, 1864, it was declared that in case of any insurance being effected on the property described in this policy at any other office, the assured should not, in case of loss or damage, be entitled to recover from defendants any greater portion of the loss sustained than the amount assured by defendants should bear to the whole amount assured on said property. There was also a condition endorsed that "in all cases of assurance the company shall be liable only for such rateable proportion of the loss or damage happening to the subject assured, as the amount assured by this company shall bear to the whole amount assured thereon, without reference to the dates of the different policies."

The policy with the British America Assurance Company, dated 4th February, 1864, insured on the building, "together with the furniture and fixtures contained therein," \$2000, and there was a condition endorsed similar to that on defendants' policy above mentioned.

Defendants contended that within the meaning of the condition endorsed on their policy, the insurance with the British America Company must be treated as an insurance of \$2000 on the building and \$2000 on the fixtures and fur-

niture, and that under the terms of their policy they were liable only for one-half of the loss on the building and one-half of the loss of the fixtures and furniture.

The plaintiffs contended that defendants were liable either for the whole loss, or for at least two-thirds of it, the total insurance being at the utmost only \$6000, of which \$4000 was insured by defendants, and their rateable proportion would be two-thirds.

S. Richards, Q. C., for the plaintiffs, cited *Phillips* on Ins. sec. 1250; *Angell* on Ins. sec. 88.

J. H. Cameron, Q. C., contra.

HAGARTY, J., delivered the judgment of the Court.

The defendants insured \$2000 on the plaintiffs' building, and \$2000 on furniture. By the contract it was provided that in case of any other insurance on the property described, the assured, in case of loss, should not recover any greater portion of the loss *than the amount assured by defendants should bear to the whole amount assured on said property.*

The British America Assurance Company had an insurance of \$2000 on the building and furniture generally.

The loss sustained was, on building, . . . \$1050

“ “ “ on furniture, . . . 878

Total, . . . \$1928

The difficulty is caused by the second assurance being general, on building and chattels. No doubt, in case of loss as to that insurance, the whole amount of \$2000 could have been recovered for damage to the building alone, or to the furniture alone, apart from any reference to any other insurance.

The defendants insist that the second insurance is to be considered for the purpose of adjustment, as \$2000 on building and \$2000 on furniture, and thus they would be only liable for half the amount on each.

To which the plaintiffs reply that this is to treat the B. A. assurance of \$2000 as if it were for \$4000, or double its actual amount; whereas, in case of a total loss, it is clear defendants' liability would be double that of the B. A. Assurance Company.

In one sense, and perhaps the most literal sense, the sum assured by defendants on the building was the same in amount as the other insurance on the building, and so as to the furniture ; because, as to the latter insurance the plaintiffs could recover the whole amount insured on the two kinds of property on a loss only affecting one kind.

But we think the plaintiffs' view is the true one. The amount underwritten by defendants was \$4000, and the amount underwritten by the B. A. Assurance Co. was \$2000, substantially a liability on defendants double that of the other underwriters.

By adopting this view we think we give effect to the true meaning of the words "in case of any insurance being effected *on the property described*," &c., "at any other office, the assured shall not, in case of loss or damage, be entitled to recover any greater portion of the loss sustained than the *amount hereby assured* shall bear to the *whole amount assured on said property*."

The amount "*hereby assured*" was \$4000, and the "*whole amount insured*" was \$6000, and two-thirds seems to be the true proportion of loss stipulated to be borne ; otherwise, we should have to read the words "the whole amount insured *on each branch* of said property."

If the building alone were destroyed, the two companies would literally have an equal amount insured on each, viz., \$2000. But when defendants, in their policy, speak of "the whole amount insured on said property," they mean the aggregate sum covering all the descriptions of property mentioned in their policy, namely, both building and furniture ; and as the B. A. Company's assurance covered both properties, although recoverable on either, we think defendants must be held to admit, for the purposes of this adjustment, that the whole amount insured was \$6000, of which they had underwritten \$4000, or two-thirds of the whole.

This construction seems to meet the spirit and substance of the contract, and certainly accords with the justice of the case.

Postea to Plaintiffs.

SARAH JANE RATHWELL V. WILLIAM RATHWELL.

Partnership—Jus accrescendi—Tenants in Common—Conversion—Trover.

A., of whom the plaintiff was administratrix, and defendant having worked and stocked a farm in partnership—*Held*, that on the death of one the survivor did not take the whole of the chattels, but that the maxim "*Jus accrescendi inter mercatores locum non habet*," applied.

One tenant in common of chattels may maintain trover against the other for a sale of the property, where such sale is plainly intended not for the objects of the joint owners, such as to pay partnership debts, &c., but in order to deprive the other owner of all interest in the property or proceeds.

In this case the defendant after A.'s death sold the stock and crops on the farm, and threatened to go off with the money, unless the plaintiff (A.'s administratrix) would settle with him on his own terms. After action brought he applied part of the proceeds towards payment of the debts, but until then he had never pretended that the sale was made with that object. The Court being left to draw inferences of fact—*Held*, that such sale was a conversion, and that the plaintiff might maintain trover.

THE plaintiff sued in trover, as administratrix of Edward Rathwell, deceased, for a large quantity of grain, horses, cattle, pigs and sheep, harness, and farming implements. The defendant pleaded not guilty, and that the goods were not the property of the plaintiff as such administratrix.

The issues were tried before Adam Wilson, J., in May, 1866, at Barrie.

From the evidence it appeared that the intestate had purchased some land in Vespra, and had obtained a conveyance of it in his own name, but the evidence also went to shew that the intestate had paid for it by the earnings and labour of his brother, the defendant, as well as by his own: that the intestate had contracted for the purchase of the south half of lot 21 in the 14th concession of West Gwillimbury, and lived upon it several years. While so living on it he married the plaintiff. The intestate was accidentally killed on the 25th of September, 1865, leaving a widow and infant child. He had married in March, 1864, after he had agreed for this purchase. This land was not paid for, and no deed of it had been given. The intestate lived in a house on one part of this land, and his father and mother and some other members of the family lived in another house, also on this land, but they did not work the land; and the defendant

made that house his home, and the other members of the family were living there when the intestate died, but defendant went to live in the same house with intestate, in the spring of 1865, and was living there at the time of his brother's death.

The defendant had generally worked with the intestate, except during an interval when he and the intestate differed as to their arrangements and understanding as to their property and position each with the other, and while this lasted defendant hired out to work with other persons, until they came to an understanding, and the defendant, as already stated, went to live at the intestate's house. The intestate had begun to work the place after his marriage. Both he and the defendant worked on it, and also worked in other places, and in other occupations, making what they could and turning into the farm what they earned. It was not pretended that the defendant had at any time claimed or received wages from the intestate. According to the evidence both took part in the management of as well as in the labour upon the farm, the defendant devoting more of his time to this, while the intestate did the trading and bargaining and outside matters.

There was abundant evidence of intestate's declarations that he and the defendant were working together, having a joint interest in the farming and property. After the intestate's death the defendant, as was proved by his own declarations, sold the crops, stock, &c., on the farm, and said that he had turned the property into money, and had it, and unless the plaintiff settled with him on his own terms he would go to the States, and she might help herself. He admitted he had got \$700.

The property was valued, one of the valutors being chosen by defendant, and he estimated the value at \$800. When spoken to by the plaintiff as to the payment of the intestate's debts, the defendant said the creditors could come upon the land for their satisfaction. He proved, however, that he did pay \$361 27 of these debts.

The learned Judge left the question of partnership to the

jury, telling them that if there was no partnership the plaintiff was entitled to recover: that if there was a partnership, it was dissolved by the intestate's death, and there was no *jus accrescendi*, but that the administratrix became tenant in common with the defendant as surviving partner: that in his opinion there was evidence of conversion, in the fact of the sale of goods of the estimated value of \$800, the debts not exceeding \$400, and further, in defendant's declaration to the plaintiff that he had sold the things and had the money, and would go away with it unless she settled with him on his own terms.

It had been contended on the part of the defendant, that on the death of one of the partners the survivor took the whole at law, and the representative of the deceased partner could only claim an account in equity; but the learned Judge was of opinion that the representative took a legal interest as tenant in common; and he suggested, that if the jury found no partnership, the verdict should be given for the plaintiff for the value of the goods, to be determined by them, less the amount of debts paid by the defendant; but if they found a partnership, that their verdict should be for defendant, and that they should state the value of the goods, and then the Court might determine on the facts whether the plaintiff took a legal interest as tenant in common, and whether the facts constituted a conversion. If there was no legal interest, or no conversion, the verdict for the defendant to stand, but if there was a legal right and a conversion, then the verdict to be entered for the plaintiff for half the value of the goods, less half the debts paid.

For the plaintiff it was argued that the defendant was, upon the evidence, at most a dormant partner, and upon the death of the other partner the legal right to all the goods, or at least to a moiety of them, passed to the administratrix, and that the same rule applied as to a moiety in the case of an ordinary partnership, and that only the ordinary evidence of conversion was necessary as against a dormant partner.

The jury found for the defendant, that the defendant was

a dormant partner, and that the property was worth eight hundred dollars; leave being reserved to move to enter a verdict for the plaintiff as suggested by the learned Judge.

In Easter Term *McMichael* obtained a rule calling upon the defendant to shew cause why the verdict should not be entered for the plaintiff for \$400, or for one-half the value of the goods converted, or for such other sum as the Court might direct, pursuant to the leave reserved; or for a new trial, the verdict being contrary to law and evidence; and for misdirection, in ruling that there could be no action of trover by one partner against another, and that the defendant, if a dormant partner, could not be liable to the administratrix of the deceased partner for acts done to the property of the partnership estate committed after the decease of the other partner; or for a new trial on the merits, and because the verdict was contrary to evidence.

Robert A. Harrison shewed cause, during Trinity Term, and cited *Buckley v. Barber*, 6 Ex. 164; *Crossfield v. Such*, 8 Ex. 825, 829; *Morgan v. Marquis*, 9 Ex. 145; *Mayhew v. Herrick*, 7 C. B. 229; *Foster v. Crabb*, 12 C. B. 136; *Harvey v. Crickett*, 5 M. & S. 336; *Fox v. Hanbury*, Cowp. 445; *Fennings v. Lord Grenville*, 1 Taunt. 241; *Holliday v. Camsell*, 1 T. R. 658; *Barnardiston v. Chapman*, 4 East 121, note; *Farrar v. Beswick*, 1 M. & W. 682, 688; *Barton v. Williams*, 5 B. & Al. 401; *McNabb v. Howland*, 11 C. P. 436; *Cameron v. Stevenson*, 12 C. P. 389; *Park v. Humphrey*, 14 C. P. 209; *Lewis v. White*, 8 L. T. Rep. N. S. 320; *Broom* Leg. Max. 406; *Lindley on Partnership*, 332, 948-950; *Butchart v. Dresser*, 4 De G. M. & G. 542; *Jones v. Brown*, 25 L. J. Ex. 345.

McMichael, supported the rule, citing *Sugden V. & P.*, 14th Ed., 698.

DRAPER, C. J., delivered the judgment of the Court.

Three points were made for the defendant: First, that, as it was found he was a partner with the intestate, on the death of the latter defendant took the whole assets, though liable to account in equity. *Buckley v. Barber* (6 Ex. 164),

and *Crossfield v. Such* (8 Ex. 825), were referred to. The latter case does not appear to us to touch the question, and in the former it was determined that the interest of a deceased partner in chattels which had been the property of the firm did not vest in the surviving partner at law, but were to be distributed between them and the representatives of the deceased partner. In that case also the Court held that the law which excepts the goods of merchants for the benefit of commerce extended further, and Parke, B., by whom the judgment was given, says (p. 180): "At a very early period the term 'merchant' was very liberally construed—it was held to include shopkeepers. The same principle of the encouragement of trade applies to manufacturers in partnership, and every other description of trade." And in a later part of that judgment it is added, "There is no clear satisfactory authority, that the surviving partner has a power, by virtue of the partnership relation only, to transfer the legal title to the share belonging to the executors of the deceased, to a third person, leaving the executors to pursue the remedy against the survivor, if that authority is improperly exercised. * * * We doubt whether surviving partners have a power to sell and give a good *legal* title to the share belonging to the executors of the deceased partner, when they sell in order to pay the debts of the deceased and of themselves; but, be that as it may, we think it clear that the survivors could have no power to dispose of it *otherwise than to pay such debts*."

But admitting this, it was insisted that the dealings and transactions between the intestate and the deceased did not bring them within the exceptional maxim, *Jus accrescendi inter mercatores locum non habet*. The case of *Jeffereys v. Small* (1 Vern. 217), was of the same character as the present. Two persons having jointly stocked a farm and occupied it as joint tenants, the bill was to be relieved against survivorship, one of them being dead. The Lord Keeper decided in favor of the relief, and said he took the distinction to be, where two become joint tenants or jointly interested in a thing by way of gift or the like, then the same

shall be subject to all the consequences of law ; but as to a joint undertaking in the way of trade or the like, it is otherwise. So in *Lake v. Craddock* (3 P. Wms. 158), the Master of the Rolls said that an undertaking upon the hazard of profit or loss was in the nature of merchandizing, when the *jus accrescendi* is never allowed. And Mr. *Lindley*, at p. 565 of his work on partnership, states that the doctrine of nonsurvivorship extends to partners generally.

The second point urged for the defendant, was that on the dissolution of a firm the surviving partner has a right to sell the effects in order to pay the partnership debts.

We do not perceive how this position advances the defendant's case, for the plaintiff is asserting a wrongful conversion, and there was no evidence whatever to shew that the defendant sold for any such purpose. His own declarations as to how the debts were to be paid, namely, out of the land, excludes the idea of the sale complained of being for such a purpose.

The third point was, that a tenant in common cannot maintain trover against his co-tenant for the joint chattels, unless they have been destroyed or sold in market overt.

One of two tenants in common of a chattel cannot maintain trover against the other, who is in possession of it, upon the technical ground that the possession of one is the possession of both. A destruction of the chattel by the possessor puts an end to this legal consequence of a tenancy in common, and the destroyer becomes answerable for the act as a conversion of the other tenant's moiety. So if the chattel were sold in market overt, because then the property was wholly changed and the shares as well of the tenant who made the sale as of his co-tenant passed to the purchaser. But by an ordinary sale it seems to have been considered that a tenant in common could convey only his own moiety, making the purchaser tenant in common with the other owner. The like consequence followed a sale by the Sheriff upon an execution against the goods of one joint owner.

Nevertheless there are expressions by some of the Judges

in *Barton v. Williams* (5 B. & Al. 395), which import that the sale of the whole by one tenant in common is with respect to the other a wrongful conversion; but it was not the judgment of the Court.

In *Fennings v. Lord Grenville* (1 Taunt. 241), Chambre, J., says: "There are cases which establish the principle that one tenant in common cannot recover for a chattel in trover against his companion, without first proving a destruction of the chattel, or something that is equivalent to it. There must be that which amounts, as it were, to an ouster, so that a tenant in common who commits it cannot account."

Again, in *Farrer v. Beswick* (1 M. & W. 682), Parke, B. observed that before *Barton v. Williams* he never entertained any doubt that a sale by one of two tenants in common was a conversion of the share of the other. On the other hand, in *Higgins v. Thomas* (8 Q. B. 908), (a case turning upon a point of pleading) it was assumed as the foundation of the argument of counsel, and was apparently adopted by the Court, that a plea by which one tenant in common confessed a conversion of the share of his co-tenant, in effect confessed a destruction of it.

One of the latest cases we have seen in which the question has been fully discussed is *Mayhew v. Herrick* (7 C. B. 229), where Coltman, J., says: "The authorities are too strong to be got over, *that the mere sale* of a chattel by one of two joint owners is not a conversion as against the other. It is not necessary, however, to decide that point here." Maule, J., says: "That doctrine, as it seems to me, is to be understood thus: that there may be dispositions of the subject matter which will amount to a conversion if done by a stranger, that are not so if done by a tenant in common. * * *

But it does not follow, that, where one tenant in common has dealt with the subject to an extent exceeding his authority—as where he sells out and out to a number of purchasers, who carry away the articles—it would militate against the true understanding of the older authorities to hold that the party may treat that as a conversion." Cress-

well, J., after commenting upon the case of *Barnardiston v. Chapman* (4 East 121, note) to which we were specially referred), says, "The property may be so entirely changed by other means than destruction or sale in market overt as to give a right of action." And Williams, J., says, "I think the true rule is, that the sale of a chattel by one of two joint tenants is not a conversion, unless it operates altogether to deprive his companion of his property in it."

This action was evidently brought upon the assumption that the intestate was sole owner of the chattels in question. The jury have, however, found that he and the defendant were in partnership in them, and that finding is well sustained by the evidence; and the question first to be decided is whether a conversion has been proved against the defendant as a tenant in common with the plaintiff of these goods, and we are of opinion that it has.

The defendant's own declarations with respect to the sale, to his motives and intentions, effectually negative the idea that he was in so selling making a disposition of the chattels in furtherance of the business or objects of the partnership. That the sale was made in order to pay off the debts due by the intestate, or as partnership debts, is to my mind very obviously an afterthought. No debts were paid, as we understand, until after the action was brought, and when defendant boasted that he had the money, the produce of the sale in his pocket, he did not pretend he had sold in order to pay debts. On the contrary, when the debts were mentioned he said the creditors might come upon the land. The goods appear to have been sold out and out—to have gone into the hands of the purchasers. The plaintiff is not informed, so far as appears, who the purchasers were. According to the evidence there was a considerable quantity of grain, which could not after a lapse of time be followed, if it ever could, and which it is only reasonable to suppose has been consumed. The circumstances amount, in the language of Chambre, J., to an ouster of the plaintiff, so that the defendant has put the goods entirely out of his possession and control, and as he has not offered to account he may be

deemed incapable of accounting for them. His act has, as a question of fact, in our opinion altogether deprived the administratrix of her property in them.

We think we are warranted by the dicta to which we have referred in holding this to be a conversion on the defendant's part, and that the plaintiff should recover.

Lewis v. White (8 L. T. Rep. N. S. 320), is to some extent at variance with this conclusion. The judgment is rested upon the previous decision in the same Court in *Morgan v. Marquis et al.* (9 Ex. 145), where the Court held that the assignees of one of two tenants in common, who had committed an act of bankruptcy, could not recover from the defendants, who had sold the goods by direction of a solvent partner of the bankrupt, either the proceeds of the sale in an action for money had and received, nor maintain detinue, the jury having found the sale was made on account of both the partners. In *Lewis v. White* the defendant was an auctioneer, who sold by direction of a solvent partner. In both cases it was, as Coltman, J., said in *Mayhew v. Herriek*, "a mere sale" of a chattel by one of two joint owners, and it did not operate, nor was it intended to operate, altogether to deprive the other partner of his interest in the property or its proceeds. The contrary is the case here. The defendant neither acted nor professed to act as a partner after his brother's death. Indeed his conduct during the life of his brother led to the finding of the jury that he was a dormant partner, for he did not assume or exercise a control over the purchase or sale of stock, &c., and it may be gathered from the evidence that the creditors dealt with and trusted his brother only. But after his (the brother's) death the defendant disposed of the property as sole owner, received all the proceeds, and threatened to go off with the money unless the plaintiff would settle with him on his own terms. If there had been a count for money had and received, there would probably have been less difficulty, but we cannot doubt that the defendant's intention was to deprive the plaintiff as administratrix of all interest either in the property or the proceeds, and the second plea shews the

intention was not then abandoned. It is true the plaintiff has a remedy in equity, but we ought not, in a case where the justice is so clear, to refuse a remedy at law unless on the clearest grounds. We think there was sufficient evidence of a conversion to be left to a jury, and are glad to feel able to sustain their verdict.

Then as to the amount of the damages, the contrary not being shewn, partners are assumed to be entitled in equal shares (*Mayhew v. Herrick*, 7 C. B. 229); and the case stands thus:

Value of the goods as found by the	
jury	\$800.00 half \$400.00
Amount of debts paid by defendant,	361.27 half 180.63
Leaving.....	\$219.37

For which sum we think a verdict should be entered for the plaintiff.

Rule accordingly.

SCRATCH V. JACKSON.

Dower—Damages—Pleading—Costs.

Demandant sued for dower as widow of J., alleging in her declaration that J. died seized, claiming damages from the time of his death, and averring service of a demand of dower. There was no plea, and the demandant went down to assess damages.

Held, that the tenant had clearly a right to shew that J. had parted with his estate, and therefore did not die seized, though he could not dispute his seizin during coverture.

The tenant proved a deed made in 1831, of the land in question, by J. to the tenant; and in reply the demandant proved another deed, made in 1834, by J. to his father, to which the tenant was a subscribing witness.

Held, that as either deed shewed the estate out of J. during his life time, it was unnecessary to consider the effect of the tenant being a subscribing witness to the second deed; and in any event, as J. could not set up the second deed to avoid the first, having made both, neither could the demandant, who claimed through him.

As J. therefore did not die seized, it was held that demandant could have only nominal damages, from the time of the demand; but that she was entitled to such damages, and the tenant was not entitled to the costs of the assessment.

Seemle, that a demandant failing in the action is liable to costs.

Seemle, that averment of the service of demand, and that the husband died seized, should not be alleged in the declaration, but suggested afterwards; and being irrelevant to the right of action, if so alleged they are not admitted by not being traversed.

Quare, when the tenant does not plead, so that there is no trial, whether the right to costs cannot be shewn by producing the demand and affidavit of service before the Master on taxation.

DOWER. The demandant, described as a widow in the count, brought this suit as widow of a former husband John Jackson.

The case had already been before this Court, and under the rule made during last Trinity Term the demandant elected to have a new assessment of damages. See *Scratch v. Jackson*, 25 U. C. R. 598.

This took place in November, at Peterborough, before Morrison, J.

For the demandant, 1. Service of a demand of dower in writing was proved to have been made upon the tenant on the 14th July, 1865. 2. An exemplification was put in of letters patent, dated 13th March, 1828, granting the east half of lot 8, in the 2nd concession of Smith, to John Jackson, who was formerly husband of the demandant. 3. John Jackson was proved to have died fourteen years ago. 4. Proof of the annual value of the premises was given.

For the tenant was put in a deed of bargain and sale, dated 13th July, 1831, from John Jackson, the demandant's husband, to the tenant, consideration £50, conveying the same premises to him in fee. One of the subscribing witnesses to this deed was called, and proved both his own signature and that of his brother, the other subscribing witness, but stated he had no recollection of the execution of the deed. John Jackson "left the lot" before he left that part of the country. His father, Ephraim, lived on the adjoining lot with another son, and died eighteen or nineteen years ago. There was no house on this land (the premises in question), only barn buildings.

The demandant's counsel objected to the receipt of this deed in evidence, upon the ground that this was only an assessment of damages, and the demandant having given *prima facie* evidence of the husband's seizin, the tenant could not go into evidence to deny the seizin. The learned Judge overruled the objection. The tenant also produced the original grant to John Jackson, as in his possession and one of the evidences of his title.

In reply, the demandant put in an Indenture of bargain and sale, dated 25th July, 1834, and made by John Jackson (demandant's former husband) to Ephraim Jackson, consideration expressed £100, for the same land, to hold in fee. One of the subscribing witnesses to this deed proved its execution, and also that the tenant was the other subscribing witness.

It was then agreed that the jury should assess damages for six years next before the service of the demand, and that the finding should be for that amount, and that leave should be reserved to the tenant to reduce the damages to one shilling, or to enter a verdict for the tenant, if the Court should so direct; the Court to be at liberty to draw inferences of fact.

The jury assessed the damages at \$188.

J. A. Boyd obtained a rule calling upon the demandant to shew cause why the assesment should not be set aside, and the costs incidental to such assesment and to this appli-

cation be ordered to be paid by demandant to tenant ; or be set off against any costs herein to which demandant might be entitled ; or why the damages should not be reduced to one shilling or such other amount as upon the facts and pleadings the demandant was entitled to claim ; and why the costs of and incidental to this application to reduce the same, and of the assessment, should not be paid or set off as aforesaid.

Hector Cameron shewed cause, and contended there was proof that the demandant's husband died seized ; at all events she was entitled to damages from the date of the demand. He cited *Harris v. Morden*, 17 U. C. R. 278 ; *Bishoprick v. Pearce*, 12 U. C. R. 306 ; *Cook v. Phillips*, 23 U. C. R. 72 ; *White v. Grimshawe*, 23 U. C. R. 75.

Boyd, contra, cited *Gosbell v. Archer*, 2 A. & E. 500 ; *Crabb R. P.* sec. 1202 ; *Park on Dower*, 302 ; *Roscoe on Real Actions*, 309, note *i* ; *Fisher v. Morgan*, Cox 125.

DRAPER, C. J., delivered the judgment of the Court.

The declaration is entitled the 18th January, 1866, which day must be considered the commencement of the suit, in the absence of anything to the contrary ; and besides claiming dower, it states that the husband died seized, claims damages from the time of his death, and avers service of a notice on the tenant demanding her dower. This notice was, as appeared, served on the 14th of July, 1865.

The Dower Act provides that the action shall be commenced by filing a declaration or plaint in the form heretofore used. In the forms then in use, when the demandant counted, which was not until the tenant had appeared, there was no averment that the husband died seized, for it would have been wholly out of place, according to the then mode of proceeding ; and it seems to be equally out of place now, for the demandant's claim to dower depends on the husband's seizin during the coverture, and not upon his dying seized. I am inclined to treat the averment of the notice to the tenant demanding the dower to be equally out of place in the count. Both of them are unimportant and irrelevant to the demandant's right to recover dower, and

until that is established there can be no question as to damages or costs. Unless some plea brings up a matter which may affect the right to damages or costs—*tout temps prist*, for example—these statements may be safely and I think should properly be left to a suggestion. The practice of declaring on bonds with condition, and afterwards suggesting breaches under the statute of Wm. III., affords an analogy. Such averments being in my opinion irrelevant, the tenant by not traversing does not admit them.

Here the tenant has not pleaded, and he has admitted seizin of the husband during the coverture and the right to dower. The present proceeding is for damages, and to shew also a right to tax costs, though possibly all that is indispensable for this purpose, where there has been no trial, is to produce the notice of demand and the affidavit of service to the Master at the taxation.

However in this case that evidence has been given, and the only point in dispute is, did the husband die seized.

We do not understand the objection taken by the demandant's counsel to the admissibility of proof by the tenant that the husband did not die seized. He could not deny that he had been seized during the coverture, but he had a right to shew that he had parted with the estate. We think the learned Judge properly received the evidence.

So far as the two deeds are concerned, each of them shews that John Jackson, the husband, conveyed away the estate, either to the tenant in 1831, or in 1834 to Ephraim Jackson, the father of John and the tenant, as we gather rather from what appeared when this case was before the Court in Trinity term, than on the present argument. No point has been made upon this relationship, nor was it so much as referred to as forming a matter for our consideration, and indeed the fact of any such relationship scarcely appears upon the learned Judge's notes.

It is therefore scarcely worth while to advert to the fact that the tenant was a subscribing witness to the deed of 1834. It could only be on the ground that it was a fraud upon Ephraim Jackson that the tenant could be affected,

that is, that he and John Jackson defrauded Ephraim by the sale to him for valuable consideration of the land conveyed to the tenant in 1831. This might entitle Ephraim to defeat the former conveyance by a proper proceeding, but it would be necessary to go much further than merely to prove that the tenant was a subscribing witness, for a witness is not necessarily privy to the contents of a deed. But in any event John Jackson could not set up this second deed to avoid the first, he having made both; and if not, how can the demandant, who claims through him only?

In our opinion it cannot be said that it was established that the husband died seized, and we do not feel called upon by the power being reserved to draw inferences of fact (a power which in effect tends to throw upon the Court the duties of jurors) to go beyond what the evidence reported by the learned Judge as given at the last trial fully warrants. We find on the notes nothing more than a statement of Joseph Kelso, the witness to the deed of 1831, to this effect: "I don't think his," meaning John Jackson's, "father Ephraim lived on this lot; he lived on the adjoining lot with another son." This is not evidence on which to infer that John Jackson was heir-at-law to his father and inherited this estate from him, though if he did proof of entry by him would not be necessary to prove title in him. The real property act dispensed with this after the 1st of July, 1834, and we infer that the father lived after that day, as the evidence of a witness states he died eighteen or nineteen years before the trial.

The demandant is not therefore entitled to damages under the Statute of Merton, and has rendered this motion necessary to prevent her recovering them. We cannot see that she has a right to more than nominal damages, and we think the verdict should be reduced accordingly. The tenant should, in our opinion, have the costs of this rule, on which he has succeeded. *Gosbell v. Archer* (2 A. & E. 500.)

On stating this result of our opinion, *Mr. Boyd* urged

that I had overlooked his application for the costs of the assessment. I certainly had not done so, for I had arrived at the conclusion that he was not entitled to them, because the tenant having been served with a demand of dower under our statute, and neither having assigned or offered to assign it, and her right having been established, it appeared to me that the demandant was entitled to at least nominal damages from the time of such demand made to the commencement of the action. Our statute gives the demandant costs in the same manner as costs are allowed to a plaintiff or defendant in personal actions, but if it appears that the tenant offered to assign the dower before action brought the demandant is not entitled to costs; and, as I understand, costs are given because the demandant has been compelled to sue for her dower which has been wrongfully withheld after demand. But I think, upon principle, and consistently with what is said in Co. Lit. 32 b, such wrongful withholding will give a right to nominal damages, quite distinct from the right given by the statute of Merton.

As however this point had not been fully considered by all the Court, judgment was postponed. We still think we cannot give the defendant the costs of the assessment. The demandant did not sustain a case for damages on the statute of Merton, and her right to costs depending on our statute, although her right to recover dower was established, it became necessary for her to prove the demand, upon which, and in the absence of an assignment of or an offer to assign dower, the right to costs accrued, and with, as appears to me, the right to nominal damages, and therefore the defendant could not recover the costs of the assessment.

We have assumed that where the demandant might if successful recover costs, the tenant might if he succeeded recover them from her, treating the statute 4 Jac. I. ch. 3, as applicable. We believe the practice has been in accordance with this view, and no point was made on the demandant's part, that although she might recover she was not made liable to pay costs.

Rule absolute to reduce verdict.

REGINA V. McMAHON.

C. S. U. C. ch. 98—Fenian Raid—Prisoner a citizen of United States, and a natural-born subject—Proof of citizenship—Evidence of acts charged, levying war, being in arms, &c.—Effect of prisoner's presence as a clergyman only.

The prisoner was convicted upon an indictment under C. S. U. C., ch. 98, containing three counts, each charging him as a citizen of the United States; the first count alleging that he entered Upper Canada with intent to levy war against Her Majesty; the second that he was in arms within Upper Canada, with the same intent; the third, that he committed an act of hostility therein, by assaulting certain of Her Majesty's subjects, with the same intent.

The prisoner's own statement, on which the Crown rested, was that he was born in Ireland, and was a citizen of the United States. It was objected that the duty of allegiance attaching from his birth continued, and he therefore was not shewn to be a citizen of the United States—but *Held*, that though his duty as a subject remained, he might become liable as a citizen of the United States by being naturalized, of which his own declaration was evidence.

Held, also, upon the testimony set out below, that there was evidence against the prisoner of the acts charged.

Held, also, that even if he carried no arms, on which the evidence was not uniform, being joined with and part of an armed body which had entered Upper Canada from the United States, and attacked the Canadian volunteers, he would be guilty of their acts of hostility and of their intent; and that if he was there to sanction with his presence as a clergyman what the rest were doing, he was in arms as much as those who were actually armed.

Held, also, that the affidavits tendered shewed no ground for interference.

A rule *nisi* for a new trial was therefore refused.

THE prisoner was indicted, tried and convicted, at the last Assizes for the United Counties of York and Peel, before John Wilson, J., under the Consolidated Statute of Upper Canada ch. 98, which enacts that "In case any person, being a citizen or subject of any foreign State or country at peace with Her Majesty, be or continues in arms against Her Majesty, within Upper Canada, or commits any act of hostility therein, or enters Upper Canada with design or intent to levy war against Her Majesty, or to commit any felony therein, for which any person would by the laws of Upper Canada be liable to suffer death," he may be tried by a Militia General Court Martial, or (sec. 3) may be prosecuted and tried before any Court of Oyer and Terminer and General Gaol Delivery in and for any county in Upper

Canada, in the same manner as if the offence had been committed in such county, and upon conviction shall suffer death as a felon.

The indictment contained three counts, charging, 1st, that the prisoner, late of Buffalo, in the State of New York, one of the United States of America, being a citizen of a certain foreign State, to wit, the United States of America, at peace with Her Majesty the Queen, on the 1st of June, 1866, and while the said foreign State was so at peace with Her said Majesty the Queen, at the village of Fort Erie, in the county of Welland, in that part of the said Province called and being Upper Canada, with divers other evil disposed persons whose names are to the jurors aforesaid unknown, did unlawfully and feloniously enter into that part of the Province of Canada called and being Upper Canada, with intent to levy war against Her said Majesty the Queen, contrary to the form of the statute, &c., and against the peace, &c.

The second count commenced in a similar manner, and charged that the prisoner having before that time joined himself to, and being then and there joined to, divers other evil disposed persons to the jurors aforesaid unknown, was unlawfully and feloniously in arms against our said Lady the Queen, within Upper Canada aforesaid, with intent to levy war against our said Lady the Queen, contrary to the form, &c.

The third count, commencing similarly, charged that the prisoner having before that time joined himself to, and being then and there joined to divers other evil disposed persons to the jurors unknown, who were then and there unlawfully and feloniously in arms against our said Lady the Queen, did unlawfully and feloniously commit an act of hostility against our said Lady the Queen within Upper Canada, in this, that the prisoner on, &c., at, &c., together with the said other evil disposed persons, armed and arrayed in a warlike manner, feloniously did assault and attack certain of Her Majesty's liege subjects, in the peace of our Lady the Queen then and there being, with intent to levy war against our said Lady the Queen, against the form, &c.

K. Mackenzie, Q. C., moved for a new trial on the ground that the verdict is contrary to law and evidence, and the weight of evidence, in this :

That there was no legal evidence to prove that the prisoner was a citizen of the United States of America, as alleged in the indictment :

That there was direct evidence on the part of the Crown showing that the prisoner was a natural born subject :

That there was no evidence at the trial to shew that the prisoner intended to levy war against the Queen :

That there was no legal proof that the prisoner entered Upper Canada with intent to levy war against the Queen, or that he was in arms against the Queen with intent to levy war, or that he committed an act of hostility against the Queen with intent to levy war against Her Majesty :

That the Crown gave no legal evidence to shew what was the object of the persons called Fenians, or who they were, or of their numbers in June last, and that there was no proof they intended to levy war on the Queen :

And that the weight of evidence went to shew that the prisoner's presence at and near Fort Erie was of a peaceful character, unconnected with any unlawful purpose, and that he was not guilty of the offences charged upon him in the indictment.

And on the ground that John Rae and several other witnesses were examined for the crown, whose names were not endorsed on the back of the indictment.

And for misdirection, the learned Judge having directed the jury that there was evidence that the prisoner entered Upper Canada with intent at the time of entering to levy war against Her Majesty ;

Having directed the jury that if the prisoner came to minister the consolations of religion to those engaged in an unlawful expedition, that he had committed an offence under the Statute ;

Having directed the jury that the prisoner need not be actually armed or engaged, in order to be convicted of the crimes charged against him in the indictment ;

Having directed the jury that the prisoner could be found guilty on the third count, although he had not personally committed any act of hostility ;

And having directed the jury that there was evidence that the prisoner was a citizen of the United States of America.

And on the grounds of surprise, in this, that one Alexander Milligan and one Dennis Sullivan swore at the trial that the prisoner was armed with a revolver, which is untrue, and the prisoner was not able to contradict him ; and that Alexander Milligan and other witnesses swore that the prisoner crossed over from Buffalo to Fort Erie early on Friday morning with the Fenians, between five and six of the morning, which is also untrue ; and that the prisoner will be able to prove at another trial that the said witnesses were in error in this respect.

Calvin's Case, 7 Co. 1 ; *Doe Hay v. Hunt*, 11 U. C. R. 367 ; *Doe dem. Auchmuty v. Mulcaster*, 5 B. & C. 771 ; *Doe dem. Thomas v. Acklam*, 2 B. & C. 779, were cited in support of the application.

DRAPER, C. J., delivered the judgment of the Court.

The first ground taken is, that there was no legal evidence to prove that the prisoner was a citizen of the United States of America, while there was direct evidence on the part of the Crown shewing that the prisoner was a natural born British subject.

The evidence touching this question was, that the prisoner stated to John Metcalfe (a witness) that he was a Roman Catholic Priest, born in Monaghan, in Ireland ; that he was a citizen of the United States, and came over from Buffalo on the 1st of June, and landed at Fort Erie. The prisoner also stated to William Crumb (another witness) that he came over with the Fenians to dress the Fenian wounds. It was otherwise proved that a body of Fenians landed at the lower ferry at Fort Erie, and that they came in canal boats towed by tugs ; these men were armed. The prisoner also said to

another witness that he came from some place in Illinois, in the States.

The argument in support of this objection was, that the Crown had made the statements of the prisoner their only evidence on this point: that they were therefore bound to take his statement as true that he was a British born subject, from which fact it followed that by the law of England he could never relieve himself from the duties and obligations of native allegiance, and the law of England in that particular was the law of Upper Canada: that the additional assertion made by the prisoner could not, though taken to be equally true, affect the legal consequences of the first; the native allegiance, of necessity, was the earliest, attaching from his birth: that the citizenship of the United States could only be of subsequent adoption, under some assumed law of the United States conferring such power of adoption upon the subjects or citizens of other Governments, which was not proved, nor could the Court judicially take notice of it; and whatever its power in the United States, it had none in the British dominions; and when the prisoner was within them, he was by law a British subject to all intents, and if he violated our laws he did so as a British subject, not as a foreign citizen.

In *Aneas Macdonald's* case (Foster, 59) the Court laid it down, that "it is not in the power of any private subject to shake off his allegiance and to transfer it to a foreign prince. Nor is it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown." But that learned writer (Foster, C. L., 183-4) suggests the question how far "prudential considerations, grounded on reasons of state, or even the principles of natural equity, may under certain circumstances induce the Crown to dispense with a rigorous execution" of that law. And he adds that cases may be put which will be considered exceptions to the general, but "not universally true" rule. It is however needless to go behind the conclusion of Blackstone, "Natural

allegiance is therefore a debt of gratitude, which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance."—*Bl. Com.* vol. 1. p. 369.

The prisoner's counsel however, apparently seeks to invert this rule, and to deduce from it an obligation on the part of the sovereign to recognize the continuance of the relation of subject, notwithstanding a distinct repudiation of the relation and an assertion of a *status* entirely at variance with it. And thus they claim that the prisoner, who is charged with and convicted of acts which involve a most flagrant breach of duty as a subject, may insist that the Crown must recognize him in that character, though merely to vary the language of the charge, or the technical character of his crime.

The authorities cited and commented upon all refer to the duty and responsibility of a natural born subject. None of them shew that it is compulsory on the Crown to treat him who has cast off his allegiance as still a British subject, or that the Crown, having a right to deal with him as a traitor, cannot proceed against him as guilty only of felony. In *Hale's Pleas of the Crown*, 497-8, it is said, "The King may, if he pleases, proceed against a traitor for felony; and anciently a pardon of all felonies discharged some treasons."

A natural born subject may, by his own voluntary acts, deprive himself of the exercise of rights which in that capacity he might otherwise claim. Thus, if he voluntarily resides and carries on business in an enemy's country, he is disqualified as an alien enemy to sue in our courts—*O'Mealey v. Wilson* (1 Camp. 482) *DeLuneville v. Phillips* (2 N. R. 97), and he would still be liable to punishment for acts of treason. If therefore a subject can by his own act deprive himself of a privilege inherent as his birthright, we do not see how the fact of his being a natural born subject can be set up so as prevent his being treated as a naturalized citizen of a foreign state, if as a fact he has become so naturalized.

Then the proof that he is an American citizen is of precisely the same force and certainty as that of his being a

natural born subject of Great Britain ; both rest upon his own declaration and admission. The two characters are not *per se* inconsistent or contradictory, however conflicting the obligations which arise from them may be. A man may be by birth a British subject, and by naturalization an American citizen. If complications and difficulties arise from the two-fold character, they result from his own voluntary act. But this consideration has no bearing on the question, whether he can in the adopted character become amenable to the laws of this Province for an offence committed within its limits. The offence as charged in this indictment can only be committed by a citizen or subject of a foreign state. We think the prisoner's declaration evidence against him that he is such a citizen, and we think further that he may in that character commit the offence charged, notwithstanding he was born in the British dominions.

In considering this objection, the case of *Woodburne and Coke*, (4 Bl. Com. 207, note *k*,) where one of the prisoners objected that he could not be convicted of an offence against the Coventry Act because his intention was to commit murder, occurred to me as presenting an analogy ; and I confess I cannot see upon what principle it can be held that a criminal can be heard to say, "I have committed high treason ; therefore I cannot be tried for felony, which the facts proved against me shew I have committed ; for those facts, and my being a British subject by birth, amount to high treason." This case is the stronger, because if the prisoner appeared clearly to be a British subject, and there was no evidence that he was an American citizen, he would still be indictable under our statute law for substantially the same felony, with some variation of statement. Then his zealous counsel might have objected that the more liberal views of modern times seem to recognize a right in every freeman to elect not merely his place of domicile, but his Sovereign or Government, and with his person transfer his allegiance also, and that the Court should not fetter such right with the antiquated doctrine of allegiance by birth being indestructible by the act of the subject.

We are of opinion the objection is untenable.

The second and third objections are disposed of by what has been said upon the first.

The fourth, fifth, sixth and seventh objections, resolve themselves into the question whether there was evidence of an intent to levy war against Her Majesty in Upper Canada, of being in arms, or of committing an act of hostility, with that intent, in Upper Canada, and that the prisoner was one of those who entered Upper Canada, or was in arms, or committed an act of hostility with that intent.

The evidence given is :—That on the 1st day of June last, at an early hour, about 800 men landed at Fort Erie, in arms, coming in canal boats towed by tugs, the inference being irresistibly that they came from the United States : that the prisoner was seen amongst them, according to some witnesses armed with a revolver, as early as six o'clock in the morning, according to other testimony about nine, and afterwards. In the afternoon of that day, he went from the Canada side in a boat with three others, apparently making for Black Rock, on the American side. He was treated with some little consideration by his companions, and addressed as "Father." The prisoner was arrested on the morning of the 3rd of June, at the door of a house a short distance from Fort Erie. He was asked if there were any wounded Fenians there. According to one witness, he said he did not know ; according to two others he denied it expressly. A wounded man with one not wounded were found in the loft, and one dead man in the barn, another in a work-shop, apparently strangers. The prisoner was then asked to account for himself, and said he had been in Buffalo, and heard of something happening here, (*i. e.* at Fort Erie) and came to do his duty in burying the dead : that he came from Buffalo on the 1st of June, landed at Fort Erie, where the Fenians took his carpet-bag and compelled him to go to Ridgway to act as chaplain for them : that he was within a half-a mile of the battle-field, and attended the wants of the wounded, both Fenians and British, and heard the confession of five wounded Fenians, who died on Saturday. He asserted he had no arms of any description, and was no

Fenian ; no arms were found on him. He also asserted that he was on his way to Montreal to see the Bishop, and some one had stolen his vestments, and he was waiting to get more. On the Saturday, as was sworn, the prisoner was talking with the Fenians in their camp, two or three being their officers, and seemed friendly with them. When the Fenians moved on that day from Fort Erie, some of them left their valises behind, and the prisoner said "Pick up the valises, the boys may want them, we do not know how long we may stay in Canada." The men picked up the valises, and the prisoner followed them. He spoke to the men and told them to take care of themselves, and said to some bystanders "Don't be afraid ; we do not want to hurt civilians." Some one said they wanted to see red red coats, and prisoner said yes, that was what they wanted. It was also proved that the Canadian volunteers in uniform were attacked at Lime Ridge by the Fenians, and some were killed and some wounded. This was on the second day of June. In the house where the prisoner was arrested on the 3rd of June were found some belts and coats, and the belts were those of the 13th, a Hamilton volunteer regiment. The house was inhabited by one Cautre, who was said to be a Major in the Fenian service, and was not seen there since the invasion. One witness spoke of the Harp of Ireland having been hoisted by the invaders. It was proved there was peace between Her Majesty and the United States. It was sworn that the Fenians, about 800, landed at Fort Erie on the 1st of June, mostly armed ; that they came up marching through the village, and after two hours marched on.

Upon this evidence it appears to us that the old expression *more guerrino arraiati* is properly applicable to these people whom the witnesses speak of as Fenians. Their landing in arms ; the talk about seeing red coats ; their marching with officers in military array ; their attack upon the volunteers in uniform, are all matters upon which there is more or less evidence ; and though as to their having "banners displayed" the evidence is very slight and inconclusive, yet upon the other points enough was proved to go

to the jury to establish the intent of these parties to levy war upon Her Majesty, for it was evidence of war actually levied and made.

At the same time we cannot refrain from saying that we think it is to be regretted some evidence was not given to explain and establish what the word "Fenians" imported. It seems rather to have been assumed that every body, the Court and jury included, understood it. Almost every witness used it as a familiar expression, and it is very probable that the sense in which they used it was the sense in which bystanders understood it. But it was a matter requiring proof, if that term explained the acts of the accused or of those among whom he was as an associate. Such proof might have prevented the possibility of question whether the acts proved amounted to levying war against the Queen.

Still we have no doubt whatever that there was evidence which the learned Judge was bound to leave to the jury, and sufficient, if believed by them, to establish an intent to levy war against the Queen in Upper Canada ; and that there was also sufficient evidence to be left to the jury that the prisoner entered Canada in connexion with these persons, and made common cause with them. Conceding even that he carried no arms, a point upon which the testimony of the witnesses is not uniform, he would, being so joined to and part of the body, be guilty of their acts of hostility, and of their intent, and so guilty of the felony created by the statute.

Most of the objections taken to the learned Judge's charge to the jury, and urged as misdirection on his part, are his ruling that there was evidence to go to the jury on the points already discussed by us. We need hardly say that as to those matters we entirely concur with the learned Judge, and are of opinion there was no misdirection.

It may however be as well to note that one objection so taken is, that the learned Judge directed that if the prisoner came to minister the consolations of religion to those engaged in an unlawful expedition, that he committed an offence against the statute.

The learned Judge reports that he directed that if the

prisoner was there to sanction by his presence as a clergyman what the rest were doing, and to administer spiritual comfort to them, and was ready to administer spiritual consolation to the wounded and dying, and to help the wounded and dying, and was there with them and of them, supporting and counselling them, he was in arms as much as those who were (*i. e.* carrying arms). This is very different from the exception taken, and is, we think, correct in substance. It expresses, though in different language, what we have already stated as our conclusion as to their being evidence to connect the prisoner with the acts of hostility and the intent to levy war.

It remains only to consider the affidavits.

We waive any discussion respecting them, excepting as to the bearing and effect of the material statements contained therein, and their sufficiency to justify the Court in granting a new trial. We assume them to be properly sworn and rightly received, and examine them accordingly.

They are three in number. The first is that of the prisoner, who describes himself as late of Anderson, in the State of Indiana. He states that he had no knowledge of the nature of the evidence against him, and was consequently taken by surprise, and unprepared for his defence : that the evidence of Sullivan and Milligan against him is untrue, particularly in reference to the statement that he carried a revolver, and he can produce witnesses to contradict this statement, and to shew that Milligan's character for veracity is not good : that it was sworn against him that he crossed to Fort Erie at an early hour on the 1st of June, whereas he can prove that he was in Buffalo until nine on that morning : that he is entirely innocent of any participation in the invasion of this Province in June last by the Fenians, and of the offence of which he has been convicted ; that he has always been opposed to Fenianism, and has on every occasion discountenanced the movement by every means in his power.

The second affidavit is made by Maurice Vaughan, of the city of Buffalo, in the United States of America, merchant ;

and the third by Daniel Vaughan, also of the city of Buffalo, merchant.

The former states that he has known prisoner for the last eighteen years, and expresses a highly favorable opinion of him: that he saw the prisoner at his (deponent's) store, in Buffalo, about 7½ o'clock on the morning of the 1st of June, and told him the Fenians had invaded Canada on the night previous, and that a battle was imminent, and prisoner expressed his determination to forego for the time being his intended visit to Montreal, of which he had spoken to deponent, and in his capacity of priest to visit the scene of battle, and be prepared to administer the extreme aids of his holy religion to such of the wounded or dying as might need them. The deponent stated that several of his personal friends were among the invaders, and gave the prisoner a list of names of his friends whom he wished the prisoner to look after. He swears that he was asked to attend at prisoner's trial, but declined, as he did not deem his evidence would be important, but hearing that it had been sworn that the prisoner was in Canada on the morning of the 1st of June before 7 o'clock, he makes this affidavit, and will, if possible, attend any trial of prisoner.

The other affidavit corroborates the assertion that the "Priest" was in Buffalo after seven o'clock on the morning of the 1st of June, and after stating that the prisoner told him he was going to Montreal, adds that he accompanied the prisoner from Buffalo to Black Rock, opposite Fort Erie, on his way to Canada, and separated from him at Black Rock between 8 and 9 o'clock on the morning of the 1st of June. He gives the same reasons for his non-attendance at the trial as the previous deponent, and says he is prepared to attend at any Court to give evidence to the above effect.

The two points of contradiction in the evidence against the prisoner relate to his being armed, and to his being among the invaders in Canada at an early hour, 5 or 6 o'clock, on the morning of the 1st of June. The first allegation is, in our judgment, for reasons already given, of no importance, unless as affecting the credibility of the witness

or witnesses who stated it. The second is the only matter of fact referred to in the affidavits of the two Vaughans.

Assuming that these deponents had been at the trial, and had contradicted Sullivan and Milligan, and had been believed by the jury, it would not in our view of the whole evidence have affected the verdict, for it was not material to the question of the prisoner's guilt or innocence of the charge contained in the indictment, whether he joined the invaders early on that morning and crossed with them, or whether he came after them and joined them in Canada at a later hour. The fact that he was there at nine and his subsequent conduct remains, and the proof of this is given by other witnesses than Sullivan and Milligan.

We cannot omit to notice that the prisoner has abstained from any observation upon the evidence of his having gone back from Canada to the United States, or, if he did so, to explain his return, or attempt to reconcile it with his assertion proved at the trial, that the Fenians compelled him to go to Ridgway to act as chaplain for them.

We abstain from comment on some of the statements contained in the affidavits of the two Vaughans. They certainly are suggestive, and at a trial must have led to some more special inquiries.

On the whole, we are of opinion that no ground taken by the prisoner's counsel as a reason for granting a rule to shew cause is sustained, and that upon the principles which govern us in granting new trials, we could not make such a rule absolute in the case.

We agree with what was said in *Regina v. Fick*, (16 C. P. 388) that unless there be some probability that the rule, if granted, would be made absolute, it should not be granted at all. We refer to the cases of *Regina v. Chubbs*, (14 C. P. 32), and *Regina v. Hamilton*, (16 C. P. 340). In the latter it was held that the discovery of evidence to impeach the testimony (*a fortiori* the character for veracity) of a witness examined at the trial is no ground for a new trial; and in the former, that affidavits of facts which were not shewn to have become known

since the trial, were not admissible on a motion for a new trial. Both these cases were elaborately discussed by the Bench and at the bar, and the authorities exhaustively considered.

The other grounds of application we have as fully as time has permitted carefully examined and weighed. We cannot arrive at any other conclusion than to refuse the rule.

Rule refused.

THE QUEEN V. LYNCH.

C. S. U. C. ch. 98—Nationality of prisoner—Proof of citizenship—Effect of his presence as reporter only.

In this case, the charge being the same as in the last, it was shewn that the prisoner had declared himself to be an American citizen since his arrest, but a witness was called on his behalf, who proved that he was born within the Queen's allegiance. *Held*, that the Crown might waive the right of allegiance, and try him as an American citizen, which he claimed to be.

The fact of the invaders coming from the United States would be *prima facie* evidence of their being citizens or subjects thereof.

The prisoner asserted that he came over with the invaders as reporter only, but *Held*, that this clearly could form no defence, for the presence of any one encouraging the unlawful design in any character would make him a sharer in the guilt.

Held, also, that the affidavits afforded no ground for interference.

THIS case differed from the case against McMahon chiefly in the fact that after it was proved for the prosecution that the prisoner had declared himself, on at least two occasions since his arrest, in writing, that he was an American citizen, and came to Canada as such, his counsel called a witness to prove that he was born within the Queen's allegiance.

The learned Judge (John Wilson, J.) told the jury that where there was evidence of a prisoner being born a British subject, and he declared himself or claimed to be a citizen of the United States, the rule of law was, once a British subject always one; but as the British Government had not held a man culpable for becoming a citizen of another State, the jury might properly take the prisoner at his word,

and it would be better to consider him a citizen of the United States, if he claimed to be one.

The motion for a new trial was on grounds similar to those in the case of McMahon. An affidavit of the prisoner was filed.

He swore that he was taken by surprise on the trial, having no knowledge of the evidence produced against him, and was consequently unprepared for defence: that he was not in arms and did not wear a sword, as sworn to by Molesworth, Stevens, and others: that he believed they mistook him for a person named "Hoozier," who was present at the raid, and who did wear a sword, and was in command of a number of Fenians: that he could produce evidence of this, and that the person referred to bore a striking resemblance to him, and that he might easily be mistaken for him: that he came to Canada on the occasion referred to simply as a reporter for the *Louisville Courier*, and had nothing to do with the invasion, and that he could prove this by the evidence of Mr. McDermott of Louisville, his employer: that he could also shew, by the evidence of Colonel O'Neill and others belonging to what is called the Fenian Brotherhood, that he never was a member of that organization, and had no act or part in the invasion of Canada, provided a safe conduct be granted to said O'Neill and the other witnesses referred to: that he was wholly innocent of the felony for which he had been tried, and that his innocence could be made to appear by the evidence aforesaid, if an opportunity was allowed for a new trial.

HAGARTY, J., delivered the judgment of the Court.

The evidence against the prisoner is very strong. The landing of a large body of invaders from the American side of the river; their being armed with rifles and bayonets, marching in order, having officers over them, some in uniform some in plain clothes, with green flags with harps, and drums; that they took prisoners and confined them; that they said they were going to take Canada and have farms; that two fights took place with the Queen's troops at

Fort Erie and near Ridgway, and men were killed on both sides—all this was proved. Five witnesses identified the prisoner as being with the invaders: and said that he had a sword; and marched with the men. One witness said he was spoken of by the men as Colonel Lynch, and that he was addressed by that name; another said that he seemed to be in command; another that he heard him give the word of command. He was not in uniform. He stated to some that he was a newspaper reporter.

The evidence of prisoner's identification, and of his being acting in aid of and in concert with the body of invaders that came over from the United States, is much stronger than in the McMahon case. That the object of those persons was to wage war against the Queen, and that they actually did so, seems to be established beyond reasonable doubt, and also that such acts and such purpose could have but the one meaning, viz., that charged in the indictment.

It is not easy to see how, on such evidence, the learned Judge could have done otherwise than have told the jury that there was evidence to support the indictment, if they gave credit to the witnesses.

Assuming that we may receive the affidavit of the prisoner, it seems to us wholly insufficient to warrant our interference. He names no person who can be produced to contradict the testimony as to his wearing a sword, a matter in itself not essential. From the day of his arrest he has apparently based his defence on the allegation that he was a newspaper reporter and a non-combatant, and, if such a defence were available, he ought to have been prepared to establish it. It would be contrary to all our practice as to affidavits of surprise, and as to the existence of fresh evidence, to consider the statement before us as sufficient ground for interference.

The prisoner, we think, wholly mistakes the nature of the charge against him, when he urges his character as a newspaper reporter to establish an immunity from the consequences of being present in apparent co-operation with the invaders. If a number of men band themselves together for

an unlawful purpose, and in pursuit of their object commit murder, it is right that the Court should pointedly refuse to accept the proposition that a full share of responsibility for their acts does not extend to the surgeon who accompanies them to dress their wounds, to the clergyman who attends to offer spiritual consolation, or to the reporter who volunteers to witness and record their achievements. The presence of any one, in any character, aiding and abetting or encouraging the prosecution of the unlawful design, must involve a share in the common guilt.

The judgment of this Court in the preceding case applies to the objections urged on behalf of this prisoner as to his nationality. Affirmative evidence of his having being born in Ireland was given.

There was direct proof that the body of invaders came from the foreign country, with which we are at peace, and *primâ facie* we think they might be reasonably assumed to be citizens or subjects thereof. The prisoner declared that he came over as a reporter for an American paper, and that he was an American citizen. It appears to us that the Crown may properly allow him the political status which he claims for himself, and that if the Sovereign within whose allegiance he may have been born do not insist to treat him as a traitor on that doctrine of extreme right, there is nothing in the case presented to us calling for our interference on this ground.

He could be tried on the same law of Upper Canada as a British subject for the same felony as that for which he has been convicted, on an indictment varying the formal description of the persons with whom he was acting in levying war, or entering the Province to levy war, &c.

Were we called on to declare the law on an indictment for treason against a born subject, we should have most likely to adopt the view of the prisoner's counsel. As it stands before us, the Sovereign waiving her extreme right, and prosecuting the prisoner as a foreigner, we see no just ground for holding the direction of the learned Judge to be erroneous in law, or the finding of the jury unwarranted by

the evidence. As the case is reported to us, we do not find that any complaint was made at the trial of the learned Judge's direction to the jury on this point, nor did the prisoner's counsel ask that the point of his nationality should be submitted as a question to the jury, nor that the counsel pressed the jury or asked them to acquit on that ground, nor did the prisoner in his affidavit applying for a new trial assert that he was a British subject, or that he claimed such position or desired to have it submitted to another jury.

We think there should be no rule.

Rule refused.

REGINA V. SCHOOL.

C. S. U. C. ch. 98—Indictment—Several counts—Election.

The prisoner in this case was indicted on two sets of counts, one charging him as a citizen of the United States, the other as a subject of Her Majesty. The learned Judge at the trial refused to put the Crown to an election between the two sets of counts, and the Court upheld his ruling.

In this case the indictment differed from the indictments in the two preceding cases of *McMahon* and *Lynch*. It contained six counts, the first three being counts similar to those in the cases of *McMahon* and *Lynch*, charging the prisoner as being a citizen of a foreign state, and the last three counts charging the prisoner as being a subject of Her Majesty, &c.

This case was also tried at the last York and Peel assizes, before John Wilson, J.

After the case was called on, *K. McKenzie*, Q.C., the prisoner's counsel, objected to the indictment because it contained the two sets of counts, and he contended that the prisoner should not be called upon to answer both sets, and that the Crown should elect on which set of counts it would proceed, on the ground that the prisoner was thereby forced

to defend himself against two distinct offences, and was thereby embarrassed in his defence. The learned Judge overruled the objection, and declined to put the Crown to an election.

The prisoner was found guilty on the 4th and 5th counts, and acquitted on the other counts.

McKenzie, Q.C., moved for a rule *nisi* to set aside the verdict, and for a new trial, the verdict being contrary to law and evidence and the weight of evidence; and he based his application upon eleven grounds, which sufficiently appear in the judgment. He also moved on the ground of surprise, and in support of the latter ground filed an affidavit of the prisoner.

MORRISON, J., delivered the judgment of the Court.

The first seven grounds taken, are objections in various ways that there was no evidence to shew that the prisoner intended to levy war against the Queen, and for misdirection and non-direction in respect thereto. Similar objections were taken in the cases of *McMahon* and *Lynch*. It is therefore unnecessary to discuss the merits of such objections, as the judgments in the cases referred to fully dispose of them.

The eighth objection is, that the Imperial act 11 & 12 Vic. ch. 12 overrides the Provincial act under which the prisoner was convicted. Upon an examination of the Imperial statute we see nothing whatever to sustain the objection.

The ninth objection is, that the weight of evidence went to shew that the prisoner's presence at Fort Erie was under compulsion.

The evidence taken at the trial shews beyond doubt that the prisoner was at Fort Erie: that he was armed with a rifle and bayonet: that he formed one of a guard detailed to take charge of prisoners taken by the invaders, and that he acted in that capacity. Five witnesses were called and examined on the part of the prisoner, to shew that he was

intoxicated at the time he left Buffalo, and when he crossed the river to Fort Erie. All the evidence went to the jury, and it was a matter solely for them to decide. The prisoner in his affidavit filed on the motion admits that he was at Fort Erie and bore arms as stated on the trial, but states that he was there by compulsion and bodily fear from the threats of the Fenians. He shews no ground of surprise, while the line of defence set up at the trial goes far to negative any such ground. Upon this ninth ground, as well as that of surprise taken in the twelfth ground, we see no reason for granting a rule; nor do we see anything in the tenth objection—namely, that there was no evidence that the persons with whom the prisoner joined himself were citizens of the United States, as alleged in the fourth count. The objection is met with the proof that the persons referred to came from the United States; and, as said by my brother Hagarty in *Lynch's* case, they may be reasonably assumed to be citizens thereof.

As to the eleventh objection, which was strongly pressed by Mr. *McKenzie*—namely, that the learned Judge refused to require the Crown to elect whether it would proceed against the prisoner as a British subject or as a citizen of the United States; and that the prisoner was thereby forced to defend himself against two distinct offences, and was thereby embarrassed in his defence—the case of *The Queen v. John Mitchel* (3 Cox C. C. 1), is an authority in support of the learned Judge's ruling.

In that case the prisoner was indicted under the Imperial Statute, 11 & 12 Vic. ch. 12. The indictment contained two counts; and at the trial the prisoner's counsel, Sir Colman O'Loughlen, objected, as in this case, that the indictment charged the prisoner with two distinct felonies, namely, compassing to deprive and depose the Queen from the style, honour and Royal name of the Imperial Crown of the United Kingdom, and compassing to levy war, in order by force and constraint to compel Her Majesty to change her measures and counsels; and it was contended that the indictment should be quashed, and that the Attorney-General

should elect as to which of the counts he would proceed upon.

After argument on the part of the prisoner's counsel, Baron Lefroy, in giving judgment, says: "We do not think it necessary to call on the Attorney-General, as we have had a full opportunity of considering the subject in consequence of the announcement which was very fairly made yesterday evening by Sir Colman O'Loughlen, of the grounds on which he intended to rest his application; and we think it of great importance, where we find the law well settled, and an established practice, not to appear to entertain any doubt upon it. We are called upon either to quash the indictment or put the Attorney-General to his election as to which of the counts he will proceed upon. It is admitted not to be an objection which will vitiate the indictment, that it contains several distinct charges—even of felony. But it is said 'that if it appear before the prisoner has pleaded, or before the jury be charged, that he is to be tried for separate offences, it has been the practice of Judges either to quash the indictment, lest the prisoner should be confounded or prejudiced in his defence, or to put the prosecutor to his election on which charge he will proceed; but that these are matters of discretion.' *Young v. The King* (in Error, 3 T. R. 106.)" * *

"We quite concur in the statement of the prisoner's counsel, that there are several compassings charged in this indictment, and that they are charged as distinct felonies. But the authority to which I am about to refer will shew clearly that there is no ground on that account for either quashing the indictment, or making a case of election, in this case. We have looked through, I believe, all the cases on this subject. One of the latest, we think, lays down the rule in such a manner as to commend itself to the judgment, as well from the reasonableness of it as from the high authority of the two learned Judges who decided the case upon great deliberation: (Mr. Baron Parke and Mr. Justice Patteson) *Rex v. Blackson et al.* (8 C. & P. 43)." And in applying the rule there laid down, the learned Baron goes on to say: "Here

is no repugnancy in the different offences charged. They constitute but one *corpus delicti*, laid in different ways. The overt acts are the very same which are charged in support of all the counts, except the two last. If the prisoner is prepared to meet them as applied to one, he is prepared to meet them as to the rest. * * * As the offences, therefore, charged in this indictment are in no wise repugnant, nor does there appear to be anything by which the prisoner could be embarrassed or prejudiced in his defence, we cannot see any ground either for quashing the indictment or putting the Attorney-General to his election,* and the motion must consequently be refused."

It is the usual practice, when it is uncertain whether the evidence will support the charge as laid, to insert several counts in an indictment. What this prisoner was called on to meet, was the levying of war or the intent to do so. The question of his being a British subject or a citizen of a foreign state, could not have embarrassed him in his defence, for, as said in the case cited, if he was prepared to meet the one set of counts, he was prepared to meet the other. The learned Judge reports to us that when the objection was taken at the trial, he stated to the prisoner's counsel he could not see in what way the prisoner's defence was embarrassed; it was for the prisoner to say whether he was a British subject or a citizen of the United States; that if he claimed to be one or the other, the learned Judge said he would put the Crown to an election, and that the Crown were prepared to do so, but the prisoner's counsel declined. Afterwards, on the trial, the question of his being a British subject was not disputed.

We are therefore of opinion there should be no rule.

Rule refused.

LYSTER V. KIRKPATRICK, ET AL.

Grant in Trust to three—Power of two to convey—Conveyance by two to the third as Rector—Lease—Estoppel.

On the 19th January, 1824, the Crown granted to O. S., G. M., and J. M., in fee, certain land, which had formerly been set apart for a Rectory, and on which a church had been erected, in trust to confirm all existing leases, and to grant new leases, and apply the rent first to the payment of any money borrowed for erecting a new church, and then to pay the rent to the clergyman of such church; with a proviso for the appointment of new trustees by the three grantees, or the survivors or survivor of them, and a further proviso, that whenever the Governor should erect a parsonage or rectory in Kingston, and duly present an incumbent thereto, the trustees should by instrument under their hands and seals, attested by two credible witnesses, convey the land to such incumbent and his successors for ever, upon the same trusts thereinbefore expressed.

On the 21st January, 1836, letters patent issued erecting a Rectory in Kingston.

Before the 10th May, 1837, the trusts of the patent of 1824 had been fulfilled, and on that day, by deed-poll, after reciting the two patents above mentioned, and the induction of the said O. S. into the said Rectory, the said G. M. and J. M., the two other grantees in the first patent mentioned, in fulfilment of the trust, conveyed the land to said O. S., as Rector and Incumbent, to hold to him and to his successors, subject to and under the uses and trusts set forth in the letters patent to them.

To this was appended another deed poll of the same date, executed by O. S., and declaring for himself and his heirs that as one of the trustees named in the patent of 1824, he agreed to this assignment, and held the same in his capacity of Rector and Incumbent of Kingston, and not otherwise.

In 1842, O. S. leased the land for 21 years, with certain covenants for building and renewal. In this lease he was described as Rector, and it recited the two patents of 1824 and 1836. The successor of O. S. brought ejectment against defendants, claiming under this lease.

Held, on the authority of *Denne dem. Bowyer v. Judge* (11 East 288) that the conveyance of 1837, passed two-thirds to the plaintiff, and that he was entitled to recover for that; for *semble*, in a court of law the ground that the trust to convey, being joint, was incapable of severance, could not arise, the legal estate only being in question.

But for that decision, *Semble*, that if the appointment of O. S. as Rector rendered him *ipso facto* incapable of acting in the trusts of the patent of 1824, it could not divest him of the estate, or prevent him from joining in a conveyance to any new trustee substituted for him; nor could the deed poll of 1837, executed by him, pass the estate vested in him in trust, in his natural capacity, to himself as a Rector and corporation sole; that whether the grantees in the patent were to be treated as taking a power, or as trustees owning the fee, the conveyance by two only of the three was inoperative; and *semble* that they were trustees.

The two-thirds having passed to O. S., as Rector by the conveyance, he still held the remaining third in his natural capacity, and the joint estate was thus severed, for as Rector he could not be joint tenant with a natural person.

The law of England in respect to the right and powers of Rectors as to the land vested them as such, is in force in this country; and in this case the provisions in the defendants' lease respecting renewal were not binding on the plaintiff, as the successor of O. S., the lessor and first Rector.

Held, that defendants were not estopped by the lease from denying the power of O. S. to lease, for the recitals professed to shew what title he had.

EJECTMENT for lot 7, in block G, in the city of Kingston.

Writ issued 28th September, 1865. Appearance by defendants as landlords for the whole.

The plaintiff claimed title as Rector for the first parsonage or Rectory within the town of Kingston, under a deed from the Hon. John Macaulay and the Hon. George H. Markland.

The defendants claimed under a lease to one John Richardson Forsyth from the Hon. George Okill Stuart, first Rector of the said Rectory, and under a mesne assignment of the lease to the Kingston Permanent Building Society, of which the defendants were respectively the president and treasurer.

The case was tried before Gwynne, Q. C., in November, 1865, at Kingston.

The plaintiff put in evidence—1st, Letters patent under the Great Seal of Upper Canada, dated 19th January, 1824, whereby—after reciting that the land thereafter mentioned had been theretofore set apart for the site of a church in the town of Kingston, which was built thereon, and that a larger church had become necessary, and it had been determined to erect the same on a different site, which Her Majesty had granted for that purpose, and that the parishoners were desirous that the site of the first church might be leased, and a sum of money be borrowed on security of the rents in aid of the new building, and Her Majesty had been pleased to assent thereto, and that the rents accruing from the said land, after discharging the debt, should be paid to the Rector of the church so to be erected, and to his successors for ever—Her Majesty gave and granted unto the Ven. George Okill Stuart, George H. Markland, and John Macaulay, their heirs and assigns, that portion of land in the town of Kingston denominated by the letter G, containing one acre (described by metes and bounds), *Habendum* to the said grantees, their heirs and assigns for ever, *upon trust* to

ratify and confirm all such leases and agreements for leases as were then subsisting, and had been entered into by the clergyman and churchwarden, on behalf of the inhabitants of the town of Kingston, of all or any part of the land thereby granted, and also to demise and lease the residue together or in parcels, for the best rent that could be obtained, for any term not exceeding 21 years, under such provisoes, conditions and covenants, and to renew and grant fresh leases at the expiration of such as then were or thereafter might be granted, as to the said grantees or any future trustees should seem fit, and to receive the rents, &c., and to apply the same, in the first place, in liquidation of the sum which might be borrowed for erecting a new church, and as soon as such sum and the interest thereon should be paid off, *upon trust*, to pay the rents, &c., to the clergyman for the time being, who should be resident and doing duty in the church about to be erected for the use of the parishioners of the town of Kingston, according to the rites and ceremonies of the church of England—with a proviso for the appointment of new trustees, and that so often as any person or persons should be so appointed, the said land should be conveyed with all convenient speed, so that the person or persons so to be appointed should be invested with all such powers and authorities, and should in all things act in conjunction with the others. *Provided nevertheless*, that whenever the Governor, &c., should erect a parsonage or rectory in the town of Kingston, and present thereto an incumbent or minister of the church of England who shall have been duly ordained, then the said grantees, and any succeeding trustees, should by an instrument in writing, under their hands and seals, then being made and attested by two or more credible witnesses, transfer and convey the said land to such incumbent or minister, being so appointed, and his successors for ever, as a sole corporation, to and for the same uses and upon the same trusts as are thereinbefore expressed.

2nd. Letters patent under the Great Seal of Upper Canada, dated 21st January, 1836, erecting a parsonage or rectory at the town of Kingston, within the township of

Kingston, designated as the first parsonage or rectory within the township of Kingston.

3rd. Deed-poll, dated 10th May 1837, whereby—after reciting the letters patent of the 19th January, 1824, and the letters patent (called a certain deed of endowment) of the 21st January 1836, and that by a mandate under the seal of the Right Reverend the Lord Bishop of Quebec, by his commissary for that purpose generally appointed, dated at Toronto, the 6th of October, 1836, and directed to all rectors and clerks whomsoever in Upper Canada, authorizing and requiring them to induct the said George Okill Stuart, minister as aforesaid, into the real, actual and corporeal possession of the said Rectory, &c., and of all the rights, &c., the said George Okill Stuart was on the 18th of October, 1836, duly inducted—it was witnessed that the said Markland and Macaulay, in fulfilment of the powers and duties of the trusts, and in consideration of 5s., granted, transferred, assigned, set over, conveyed and confirmed to the said G. O. Stuart, as Rector and Incumbent of St. George's Church, in Kingston, the said land described in the deed of trust, together with, &c. *Habendum* to the said G. O. Stuart and his successors for ever, "subject and under the uses and trusts set forth in the said letters patent of the 19th January, 1824."

To this was appended a deed-poll of the same date, executed by the said George Okill Stuart, declaring for himself and his heirs that as one of the trustees named in the original deed of trust he consented and agreed to this assignment, and that he now received and took and held the same, with the appurtenances thereof, in his capacity as Rector and Incumbent of Kingston, and not otherwise.

The presentation and induction of the said George Okill Stuart, as recited in the foregoing deed, was admitted, and that the said George Okill Stuart died in October, 1862.

The presentation and induction of Dr. Lauder, in November, 1862, as successor to Dr. Stuart, was admitted, and the presentation and induction of the plaintiff on the 20th June, 1864, was also admitted.

It was further admitted that the trust created by the letters patent of January, 1824, was fulfilled.

For the defence, a lease dated 16th August, 1842, and made between the Venerable George Okill Stuart, described as Rector of Kingston, of the one part, and John Richardson Forsyth, was put in evidence. By this lease—after reciting the letters patent of January, 1824, and of the 21st January, 1836, and the deed-poll of the 10th May, 1837, and that it had become desirable that the buildings on the lot should be of brick or stone, and that the lessee had proposed to build of brick or stone upon getting a lease for twenty-one years, and that the lessor, by virtue of the powers vested in him by the said letters patent and the said deed-poll, was willing to grant such lease, subject to certain conditions and provisions for the valuation of such buildings as might be on the premises at the expiration of the term, or for the renewal of the lease for such further term as should be agreed upon—it was witnessed that the lessor had demised, &c., the premises to the lessee, *habendum* from the 24th of January then last past for the term of twenty-one years, yielding and paying £125 each year by equal half-yearly payments. The lessee covenanted to pay rent, with a proviso for re-entry on non-payment. And the lessor, for himself and his successors, covenanted with the lessee, his executors, &c., that at the end of twenty-one years all buildings of brick or stone which should be erected on the demised premises, should be valued by arbitrators, to be appointed as therein provided for, which arbitrators should value the buildings, the award to be final, and that the lessor or his successors should pay to the lessee, his executors, &c.. the amount of the valuation, or execute to him and them a new lease of the premises, upon such terms as might be agreed on. Provided, that until the valuation be paid, or the new lease executed, the lessee, his executors, &c., should remain in possession, subject to the rents and conditions thereinbefore expressed; and an agreement was declared to secure the appointment of arbitrators.

It was admitted that the defendant Kirkpatrick claimed under this lease.

A demand of the rent due up to the 24th July, 1864, by the plaintiff, was made in August, 1864, and it was admitted that the previous rent up to January, 1864, was paid to Dr. Lauder.

It was admitted that a stone house was erected by the lessee under the proviso in the lease, and that no valuation or arbitration had taken place, and that neither party had taken any steps to procure the same.

This was the defendants' case, and for the plaintiff it was objected:

1st. That the lease of the 16th August, 1842, was wholly invalid as against the plaintiff, being executed by the lessor, George Okill Stuart, in his individual character, and not as a corporation sole, and did not bind his successor.

2nd. That this lease was not authorized by the letters patent of 1824, as the covenant for renewal was beyond the language and intent of the grant.

3rd. That the lease was void under the restraining statutes affecting Rectors, and also at common law; and if it ever had validity, it did not bind the present Incumbent as successor, first, because it had not been confirmed by the Bishop, or Patron and Ordinary; second, that the term did not commence from the day of the date of the lease, but from an antecedent day.

4th. That the lessee had been guilty of laches, in not calling upon the Rector to appoint an arbitrator for the valuation, and they were not therefore entitled to retain possession under the lease.

The learned Queen's Counsel held that the Rector as a corporation sole held this land upon the trusts of the patent of 1824, and not as glebe lands: that the restraining statutes did not apply; and that the sole question was, whether the lease of August, 1842, was valid, having regard to the trusts of the letters patent of 1824.

A verdict was rendered for defendants, with leave to the plaintiff to move to enter a verdict for himself upon the above points, or any of them, if the Court should be of opinion that the plaintiff ought to succeed.

In Michaelmas Term, 1865, *Robert A. Harrison* obtained a rule calling upon the defendants to shew cause why a verdict should not be entered for the plaintiff, pursuant to leave reserved, on the following grounds—taking the objections raised at the trial, excepting the last; and adding that no rent had been received by the plaintiff, and that the defendants could not retain possession under the lease as against the plaintiff, the term created having expired.

The case was argued twice, first in Hilary Term last, and again in Trinity Term on the question as to the effect of the conveyance by the two trustees to Dr. Stuart. The next case, *Lyster v. Ramage*, was argued at the same time, *McLennan* appearing for defendant Ramage.

Crooks, Q. C., and *McLennan*, shewed cause, citing Co. Lit. 45 a, note 2, 169 a, 187 b, 188 a, 190 a, 190 b, 304, 335 a; *Williams* on Real Property, 117; *Grant* on Corporations, 626, 630, 632-3; *Lewin* on Trusts, 373, 374; *Stephen's Law of the Clergy*, 594; *Burn's Ecclesiastical Law*, Vol. II, p. 283-4; *Preston* on Abstracts, Vol. II, p. 60; *Long v. The Bishop of Cape Town*, 1 Moore, P. C. N. S. 411; *Re The Bishop of Natal*, 11 Jur. N. S. 353, S. C. 12 L. T. Rep. N. S. 188; *Bowerbank v. The Bishop of Jamaica*, 2 Moore P. C. C. 452; *Attorney-General v. Brooke*, 18 Ves. 319; *Attorney-General v. Kerr*, 2 Beav. 428; *Attorney General v. St. John's Hospital*, 11 Jur. N. S. 629, 12 L. T. Rep. N. S. 714; *Robson v. Flight*, 10 Jur. N. S. 1228; *Attorney-General v. Mayor of Stamford*, 2 Swans. 592.

Robert A. Harrison supported the rule, and cited *Denne dem. Bowyer v. Judge*, 11 East 288; *Gale v. Gale*, 2 Cox Chy. Rep. 136, 156; *Beckett v. Bradley*, 7 M. & G. 995; *Wiles v. Woodward*, 5 Ex. 557; *Pargeter v. Harris*, 7 Q. B. 798; *Greenaway v. Hart*, 14 C. B. 340; *Bradshaw v. Thompson*, 2 Y. & C. 295; *Attorney-General v. Fishmongers Co.*, 2 Beav. 599; *Attorney-General v. Grasett*, 5 U. C. Chy. Rep. 412; S. C. In Appeal, 6 U. C. Chy. Rep. 200; *Attorney-General v. Lauder*, 9 U. C. Chy. Rep. 461; *Becher v.*

Woods, 16 C. P. 29; *Hill v. McKinnon*, 16 U. C. R. 216; *Nudell v. Williams*, 15 C. P. 348; *Potter v. Chapman*, Amb. 98; *Sinclair v. Jackson*, 8 Cowen 543; *Leach v. Thompson*, 1 Shower 278, 280; *Tollet v. Tollet*, 2 P. Wms. 490; *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 206; *Leech v. Leech*, 24 U. C. R. 321; *McNab v. Stewart*, 15 C. P. 189; Co. Lit. 103 a, 300, 304, 329 a; *Watkins on Conveyancing*, 16, 158, 164-6; *Grant on Corporations*, 632-3, 643-5; *Cripps on the Law of the Church*, 143; *Hayes on Conveyancing*, 109, 384; Bac. Ab. Leases, F. 9; *Hill on Trustees*, 306, 440; *Sugden on Powers*, 5th Ed. 404; *Preston on Abstracts*, Vol. II, p. 60.

DRAPER, C. J.—The first question appears to be, what is the effect of the conveyance of the 10th May, 1837.

The difficulty arises from the fact that Dr. Stuart, being one of the grantees under the patent of 1824, was presented and inducted as Rector, and in that character or capacity was entitled as a corporation sole to have a conveyance made to him and his successors by the grantees in trust under the patent.

It was suggested by the defendants' counsel during the argument, that outside the letters patent of 1824, and except as to the land granted thereby, the plaintiff was not shewn to be a corporation sole. Reference was made to Sir William Grant's well known judgment in *Attorney-General v. Stewart* (2 Mer. 143), that the statute of Charitable Uses did not extend to the Colonies—a decision upheld by *Whicker v. Hume*, (7 H. L. Cas. 124); and also to *Long v. The Bishop of Cape Town*, (1 Moo. P. C. C. 411, N. S.), and *Re Bishop of Natal* (11 Jur. N. S. 353), with some other authorities.

If I am right in supposing that it was intended to urge that the law of England in reference to the rights and powers of Rectors, or Parsons, as to the lands vested in them as their glebes or endowments appurtenant to their Rectory or Parsonage, are not introduced and in force in this Province, I have no hesitation in affirming my clear opinion to the contrary. That the law of England, under

which ecclesiastical Courts are constituted, and ecclesiastical jurisdiction is administered in such Courts, forms no part of our law, I fully admit, as I do that the Church of England has no legal status or privilege in that character differing from that of the Church of Scotland, or any other body or denomination of protestants in this Province. But I think the provisions of the Constitutional Act of 31 Geo. III. ch. 31, secs. 38 and 39, which authorized the erection and endowment of Rectories, and presentation by the Crown of the Rector, invest such Rector with the Rectory, and with all rights, profits and emoluments thereto belonging or granted, as fully, and in the same manner, and on the same terms and conditions, as the Incumbent of a Rectory in England; and that a Rector in this Province, after induction, has the same right to resort to the civil tribunals to enforce such rights and obtain such profits in his capacity as a corporation sole, as a Rector in England has there; and that such Civil Courts have, as is said in *Long v. The Bishop of Capetown*, jurisdiction to determine questions even of an ecclesiastical character, so far as essential to the decision. And in my opinion the first statute passed in Upper Canada puts this beyond all doubt, by enacting that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as the rule for decision. The question in this case is one of right to property, claimed in a character sanctioned by the 31 Geo. III., and within the limitations of that statute the question must be decided according to that rule. This law has been recognized on more than one occasion by our Courts, as in *The Attorney-General v. Lauder* (9 Grant 461), and *Hill v. McKinnon* (16 U. C. R. 216), and other cases.

Hence I conclude that the enabling and restraining statutes of Henry VIII., and of Elizabeth, are in force and apply to leases made by Rectors in Upper Canada.

The recital in the letters patent shew a clear intention that as soon as the money which the grantees were empowered to raise should be paid off, the rents to accrue from the land should be paid to the Rector and his successors.

The grant itself interposes between such payment and any transfer to the Rector a trust (until there shall be a Rector) to pay the rents to the clergyman for the time being doing duty in the church to erect which the money was to be borrowed; but whenever a clergyman should be presented as Rector, the three grantees, naming them, or any trustee appointed to succeed either of them, are directed and empowered, by an instrument in writing, under the hands and seals of the trustees then being, made, and attested by two credible witnesses, to transfer and convey the said land to such clergyman and his successors for ever as a sole corporation, "to and for the same uses and trusts" as are expressed in the letters patent, and in default of any or which conditions, limitations and restrictions, and of the performance of the said trusts, the grant was declared to be void.

The direction that the conveyance to the Rector should be upon the trusts set forth in the letters patent, appears at first sight inconsistent with the apparent intention to vest the estate directly in the Rector and his successors, for literally it would make the Rector for the time being both trustee and *cestui que* trust. This language was, I apprehend, used only to provide against the contingency that a Rector might be presented before the money to be borrowed was paid off, in which event he could only take the land subject to the burden; and further, if in any leases which the grantees in trust might have made to facilitate either borrowing or re-payment, there were covenants obligatory on the lessors, that the Rector should become subject to their fulfilment. In the events which happened, it seems that every trust that was created by the letters patent was fulfilled before the 10th May, 1837, when two of the grantees, Macaulay and Markland, conveyed to the third, the Rev. Dr. Stuart, who had a short time previously been presented to the newly erected Rectory. If there were any existing leases then, we may safely assume that when the lease of the 16th August, 1842, was made, there was none which affected the land thereby demised.

The letters patent constituted the three grantees joint tenants of the land in question, and provided that if any of these grantees should die, or be desirous of being discharged from the powers and trusts vested in them, or become incapable of acting in the same, it should be lawful for and power was given to the grantees, *nominatim*, or the survivors or survivor of them, by writing under his or their hand and seal, to nominate, substitute and appoint any other fit person in place of them, the said grantees, or any succeeding trustee who should die, or be desirous of being discharged, or become incapable, and so from time to time to nominate, &c. ; and when and so often as any other person or persons should be so nominated and appointed, the land should be conveyed, &c., and such person should hold, &c., as fully as if he had been named in the letters patent as a grantee. This power has not been exercised.

The deed-poll of the 10th May, 1837, was executed by Macaulay and Markland alone. If the appointment of Dr. Stuart to be Rector rendered him *ipso facto* incapable of acting in the trust, it would not also have divested him of the estate of which he was a joint tenant under the letters patent, nor, as appears to me, have prevented him from joining in a conveyance to any new trustee who was substituted for him. His co-joint-tenants were not his survivors, so that they took the whole estate by reason of such assumed incapacity, any more than if he had been desirous of being relieved from the trust. If, notwithstanding this deed-poll, he continued to be joint-tenant, I see no evidence of his being afterwards divested of that estate, for I am of opinion no such effect can be given to the deed-poll or declaration of the same date executed by himself. I therefore think that, conceding that the deed from the other two joint tenants passed their undivided two-thirds to Dr. Stuart as Rector and a corporation sole, he still held the other third in his natural capacity. The joint estate in that case would be severed, for in his politic capacity as Rector Dr. Stuart could not be joint-tenant with a natural person. The estate as Rector would at his death go to his successor,

which the other person would not be in his natural capacity ; there could be no right of survivorship. If lands be given to a man and his successors in a politic capacity, and also to him and his heirs in a natural capacity, he becomes tenant in common with himself—Co. Lit. 190 *a* ; and on the assumption that the estate of the other two joint-tenants passed by their deed-poll to Dr. Stuart as Rector, at his death there were several inheritances, one to his successor, the other to his heirs-at-law.

Either this conclusion must be accepted, or the deed poll from the two joint-tenants to the third must be held to be inoperative, as being an insufficient execution of the trust or power to convey to the Rector, the trust or power being to three grantees and their successors, and requiring a conveyance from the three while the estate continued as it was granted. It certainly was not the intention of the Crown that the grantees should dispose of the fee simple otherwise than by a transfer of it in its entirety to the Rector, and this has not yet been done. It does not seem to me possible to treat their deed to Dr. Stuart as constituting him sole trustee, and vesting the whole estate in him in that character. And were such a construction possible, it would, I apprehend, be fatal to the plaintiff's case.

If the direction in the letters patent is to be treated as a power, it appears to have been settled ever since Sir Edward Clere's case (6 Co. 18 *a*) that a power over the inheritance may co-exist with a fee in the same person ; as where A. seized in fee made a feoffment to the use of such person and of such estate as he should limit and appoint by his last will, and died, making a will which except as a limitation of the use would under the particular facts have been inoperative ; and the devise was upheld as a valid execution of the power. (See Co. Lit. 111 *b*). And in *Maundrell v. Maundrell* (10 Ves. at pp. 254–5) Lord Eldon treats the proposition as undeniably settled.

In the present case the grantees took no benefit or interest under the Letters patent. The fee was vested in them upon trust, and with express powers to raise money thereon,

to lease, and ultimately to convey the fee to a particular Rector and his successors after the erection of a specified Rectory and the presentation of a Clerk to be the Rector. While the three grantees were living they must have joined in order to make valid leases or a conveyance as an execution of the power. The estate having once vested in the three, a subsequent inability of one to continue to execute the trust would not entirely transfer the estate to the other two, nor operate upon their estate, as the death of the third would, to vest the estate in them by survivorship. It was obviously intended to prevent a devolution of the fee by operation of law on the heir of the last survivor of the three, that the proviso was inserted in the letters patent for the appointment of new trustees, and for the conveyance of the estate to such new trustees. This power is given only to the grantees and the survivor or survivors of them, and not to the heirs of the survivor. In this view the power, thus coupled with an estate in the land, has never been executed, for the three grantees have not concurred in the execution of a conveyance under its authority.

The cases of *Tollet v. Tollet* (2 P. Wms. 489), and *Holmes v. Coghill* (7 Ves. 499), relate to the power of a Court of Equity to make a defective execution of a power good. They do not help the plaintiff, on whose behalf they were cited, 1st, because a Court of Law exercises no such authority; 2nd, because the power to the *three* trustees has not been executed at all.

If however, and this was the strong leaning of my opinion during the argument, the grantees are considered merely as trustees having the fee, it equally appears to me that the concurrence of all the grantees in the conveyance of the 10th May, 1837, made while they were living, was necessary, and that for want of it no estate passed. There is nothing in the letters patent to authorize a partial conveyance, a conveyance less than the whole and entire fee to the Rector, and that is not yet done. The deed poll executed by him declaring his consent to the assignment, and that he "now" received and held "the same" (meaning, I presume, the

land and not the instrument purporting to assign two undivided third parts in it) in his capacity as Rector, appears to me not merely an inartificial but an ineffectual attempt to pass the estate which was vested in him in his natural capacity in trust, to himself in his politic capacity as Rector and a corporation sole.

I have not been able to satisfy myself that he could not have effectually joined the other two grantees in the conveyance. In a recent case, *Cowper v. Fletcher* (6 B. & S. 464), it was held that two of the three joint-tenants might demise their two undivided parts to the third, and that the usual incidents of reversion and right to distrain would arise upon such demise. The three were devisees in trust of the premises so leased, and there had been a written proposal from the third as an individual to the three as executors to rent the property, and all three had signed an acceptance of it; and though the cases are not analogous, some of the language used in this decision tends to confirm my impression. There is, perhaps, less difficulty in the case before us, first, from the fact that Dr. Stuart held the land as a trustee for the very purpose of conveying it to the person who should thereafter be appointed Rector; and, second, that although he was the Rector presented, yet the conveyance was to be made to him as a Corporation sole. If he had become incapable of further acting in the trust (a point not much pressed in argument) his place might have been filled and a conveyance executed by him and the other two grantees to the succeeding trustee. *Townsend v. Wilson* (1 B. & Al. 608), is a strong authority that the other two grantees could not make a good conveyance. It is to be observed that the only power given to the survivor or survivors of the three grantees relates to the appointment of new trustees and the conveyance of the estate to them.

I have looked at the case of *Leach v. Thompson* (1 Show. 278), and *Society for Promoting Practical Knowledge v. Abbott* (4 Jur. 453, 2 Beav. 559), but they do not appear to help the plaintiff's contention that the deed of May, 1837, passed the estate of the two grantees by whom it

was executed to Dr. Stuart in his corporate capacity as Rector.

Unless, therefore, this land actually was, when this action was brought, part of the endowment, apart from any title derived through the grantees in the letters patent of 1824, the plaintiff has shewn no legal title to the whole. It was not shewn that as Rector the plaintiff had any other claim than as successor to Dr. Stuart, or that Dr. Stuart had any title but that stated in the recitals to the lease made by him, and dated in August, 1842. I see no ground for holding that the letters patent of 1824, by themselves, and without any action on the part of the trustees, can operate to vest the land in the Rector, nor was this the ground on which the plaintiff's right to recover was rested.

It was however urged on the argument that the defendants were estopped from denying the plaintiff's title by their acceptance of and enjoyment under the lease from Dr. Stuart. This objection does not appear to have been made at the trial. If it had been, we cannot avoid noticing that the recitals in the lease profess to shew what title to grant a lease Dr. Stuart had, and either party has a right to take advantage of those facts and of the legal consequences resulting from them.—See *Cuthbertson v. Irving* (4 H. & N. 742, 6 H. & N. 135); *Doe v. Goldsmith* (2 Cr. & J. 674.) If it were admitted, however, that the defendants are estopped from denying that Dr. Stuart had a power to lease, they are still free to shew that upon the facts recited the plaintiff has no title to the possession. It might perhaps be argued, that if such an estoppel binds the defendants it must equally bind the plaintiff, claiming by the estoppel, from denying that Dr. Stuart could make the covenants which he entered into. I do not, however, rest anything upon this suggestion. It can have no bearing, unless upon the assumption that Dr. Stuart became by the conveyance of his co-grantees sole trustee, and that his lease could be upheld as made in that character, though if so it would not be necessary to resort to the doctrine of estoppel. The letters patent give to the trustees very extended leasing powers.

But for the case of *Denne dem. Bowyer v. Judge* (11 East 288), I should have held that the plaintiff's case failed, but after long and very earnest reflection I am unable to say that I can deny the plaintiff's right to recover two-thirds without coming into direct conflict with that authority; the point that the trust to convey was a joint trust, incapable of severance, being most probably treated as not a question for a legal as distinguished from an equitable tribunal, and that in a Court of Law the legal estate and matters incident thereto furnish the limits for adjudication.

In this view, though still with some hesitation, I think the plaintiff must have judgment to recover two-thirds.

We have considered the lease, and are of opinion that it contains provisions respecting renewal which are not binding on the plaintiff as successor to the first Rector.

HAGARTY, J.—I have arrived at the same conclusion as the Chief Justice, and with at least equal hesitation.

MORRISON, J., took no part in the judgment, not having been present during the second argument.

Rule accordingly (a).

LYSTER V. RAMAGE.

Ejectment—Plaintiff entitled to a share only—Form of postea—Defence by tenant in common—Practice.

In this case the plaintiff's title was the same as in the last case, and he was held entitled to recover two undivided third parts, for the reasons there given.

It was urged on the authority of *Leech v. Leech*, 24 U. C. R. 321, that the plaintiff being held so entitled, the postea should be awarded to him generally—but *Held*, not, the proceedings on both sides having been directed to try the title to the whole.

Quære, whether in this country, owing to the provisions as to notice of title, a plaintiff must give notice of his claim being only for a moiety, before he can insist upon defendant admitting his claim and denying actual ouster.

EJECTMENT for the east half or part of lot 5, in Block G., in the city of Kingston. Writ issued 28th of September, 1865. Defence for the whole.

The case was tried at Kingston, in November, 1865, before Gwynne, Q. C.

The plaintiff's case was the same as in *Lyster v. Kirkpatrick et al.*

On the defence was a lease (the execution admitted) dated 2nd August, 1841, between the Venerable George O'Kill Stuart, of Kingston, &c., Rector of Kingston, of the one part, and John Jenkins of, &c., of the other part, whereby the lessor demised and leased the premises in question, *habendum* to Jenkins, his executors, administrators or assigns, from the 17th of March, for the term of twenty-one years, yielding and paying seventeen pounds ten shillings in half-yearly payments, on the 17th of March and the 17th of September, in advance. The lessee covenanted, among other things, to build within two years on the premises a brick or stone house at least two stories high, and to repair: Proviso, if rent allowed to fall in arrear, or if repairs not done, lessor may re-enter. Covenant by lessor for quiet enjoyment; and the lessor, for himself and his successors, covenanted that if the lessee built a house according to his covenant in that behalf, that he or his successors would either take the same at the end of the term, at the valuation of indiffer-

ent persons to be chosen by the parties to the lease jointly, and pay for the same at the valuation, or grant a new lease on such terms and conditions as might be agreed upon by the said parties.

Notice was served on behalf of the plaintiff upon the defendant on the 17th of July, 1865, to deliver up possession.

It was admitted that after the expiration of the foregoing term rent had been paid for these premises to Dr. Lauder, the rector who succeeded Dr. Stuart, but that no rent had been paid to or demanded by the plaintiff, the now rector, who succeeded Dr. Lauder.

A verdict was rendered by consent for the defendant, with leave, as in the case against *Kirkpatrick et al.*, for the plaintiff to move to enter a verdict for himself, if upon the points taken in that case the Court should be of opinion that the plaintiff was entitled to succeed.

In Michaelmas Term, 1865, *Robert A. Harrison* obtained a rule to shew cause on the following grounds :

1. That the lease is not valid as against the plaintiff, not being executed by Dr. Stuart as a corporation sole, but only in his individual capacity.

2. That the lease is not authorized by the letters patent of 1824, as it attempts to bind the succeeding rectors, and to make the lease perpetual.

3. That the lease is void under the restraining Statute, 13 Eliz. ch. 10, and at common law.

4. That the lease is void, not having been confirmed by the patron and ordinary.

5. That the lease is in effect for more than 21 years or three lives.

6. That the lease does not commence from the day of its date.

7. That no rent has been received by the present plaintiff.

8. That the defendant cannot retain possession under the lease as against the plaintiff, the term having expired.

In Hilary Term last, *McLennan* shewed cause.

This case as well as *Lyster v. Kirkpatrick*, was argued a

second time in Trinity Term, by *Adam Crooks*, Q. C. for the defendant, and *Robert A. Harrison* for the plaintiff, both cases being argued together, and the authorities in the previous case cited in each.

DRAPER, C. J., delivered the judgment of the Court.

There is only one important difference between this case and that of *Lyster v. Kirkpatrick*. The lease under which the defence is set up contains no provision for the tenants retaining possession after the expiration of the term of twenty-one years.

We decide, as in that case, that the plaintiff has shewn title to no more than two thirds of the land granted by the Crown by letters patent of 1824, for no conveyance of more to Dr. Stuart, the first rector, was proved, and he held the remaining third as one of the grantees in that patent, not as rector. This third consequently did not pass to the plaintiff by his induction as rector, and he shews no other title.

It was not even suggested at *Nisi Prius*, in either of these cases, that the leases made by Dr. Stuart made the lessee tenant as to two-thirds to the rector as a corporation sole, and as to one-third to Dr. Stuart as an individual proprietor. On the plaintiff's part it was insisted that the defendant held under the corporation sole, but that the lease contained covenants on the lessor's part not binding on his successor, and that on the expiration of the term he, the successor, had a right to possession. He did not, however, confine his proof to the lease, and to the fact that defendant had held under it, and still continued in possession. The letters patent of 1824 were put in, under which he endeavored to establish his title. In the argument before this Court it was however urged that the tenants had taken leases from Dr. Stuart *qua* rector, and were estopped from denying his title in that capacity or the title of the plaintiff, his admitted successor; though it was also, somewhat inconsistently, objected that the lease was made by Dr. Stuart in his personal capacity, and therefore did not bind the plaintiff. We need not repeat our reasons for holding that there was no estoppel.

However, after judgment had been delivered in the other action, and some other matters had been disposed of, our attention was called to the case of *Leech v. Leech* decided in this Court in Hilary Term 1865 (24 U. C. R. 321), in which the claimant set up a title to half of a certain lot under a conveyance which the jury found to be voluntary, while it appeared that the defendant was entitled to an undivided moiety of that half lot under a subsequent conveyance for value. The defendant had given no notice limiting the defence to such moiety, or denying an actual ouster; her defence covered the plaintiff's entire demand. In stating the opinion we had formed respecting the conflicting claims, I observed that the claimant was in strictness entitled to the *postea*, but no formal judgment was given; and possibly it was open to question how far the plaintiff was bound to have given notice of his claim being only for a moiety, before he could insist that the defendant should admit his claim and deny actual ouster. The necessity of giving notice of the title intended to be relied on, may raise a different question from what would arise in England upon a similar enactment as to joint tenants, &c.

But this case was pressed upon us, and with quite as much urgency as the occasion excused, as shewing that we should order the *postea* to the plaintiff generally; in effect, that we should enable him to take out an *Hab. Fac. Poss.* for the whole. This contention rests upon the 29th and 30th sections of our Ejectment Act, which are similar to the 188th and 189th sections of the English C. L. P. Act, 1856. Before that law was passed a joint-tenant, tenant in common, or coparcener, had no right to recover in ejectment without proof of actual ouster by his co-tenant, &c., who was in actual occupation—a rule founded on obvious common sense. In these cases, however, the plaintiff was not seeking to recover as a tenant in common; his notice of title and his entire proceedings were directed to a demand of the whole, nor has the defence been rested on the assertion of a right to possession short of the possession of all the premises contained in the lease. Both sides ignored if they

did not repudiate the idea of a tenancy, joint or in common ; and the defendant could not, consistently with his actual defence, have admitted the plaintiff's right to an undivided part, when he was urging that by a covenant binding upon the plaintiff he, the defendant, had a right to possession because he had a right to have his lease renewed. The case is really more like that of *Denne dem. Bowyer v. Judge* (11 East 288), which is referred to in the judgment in the other case, where the Court held that the plaintiff was entitled to a verdict for three undivided fifth parts, having failed in proving a conveyance for more.

The observations of the Judges (the majority) in *Doe v. King* (6 Ex. 791), tend, we think, to sustain this view strongly, which is consistent with the unreported case of *Davenport v. West*, decided by the Court of Common Pleas last May.

We are of opinion in this case also that the plaintiff is entitled to recover two undivided third parts.

Rule accordingly.

THE PRESIDENT DIRECTORS AND COMPANY OF THE GORE
BANK V. JAMES S. MEREDITH AND JANE HIS WIFE,
MARY WILSON NOTMAN, AND WILLIAM NOTMAN.

Note signed by Executors Per. Proc. J. M.—Proof of authority to bind them personally.

Action against J. S. Meredith and J. his wife, M. N., and W. N., as makers of four notes signed "The executors of the estate of the late William Notman, per Pro. James S. Meredith." M. N. was called as a witness by plaintiffs, and proved that Meredith had managed the affairs of the estate since testator's death, and she had left it to him to do what he thought best in winding it up ; but she said she never gave him power to make her personally liable, and that she knew nothing of these notes. The Jury having found for the plaintiffs—

Held, that though Meredith might have sufficient authority as regarded the estate, he clearly had none to bind defendants personally, as they were sued ; and a nonsuit was ordered.

DECLARATION, that the defendants, under the name and style of "the executors of the estate of the late William

Notman," on the 11th of January, 1866, by their promissory note promised to pay to the order of James McIntyre at the Gore Bank, Hamilton, three months after date, the sum of \$700, and the said James McIntyre endorsed the said note to James McIntyre and Co., who endorsed the same to the plaintiffs. There were three other counts, each founded on a different promissory note made by defendants "under the name and style aforesaid."

Pleas by Meredith and his wife—1, Did not make—4th plea, denying the endorsement to plaintiffs by the payees, the executors of the late James B. Ewart. There were other pleas under the Stamp Act. Similar pleas were pleaded by the other defendants.

The cause was tried at Hamilton, in November last, before Richards, C. J.

The four notes declared upon were produced and proved to be in the handwriting of the defendant Meredith. That set out in the fourth count was dated 2d December 1865, at three months, payable to the order of the Executors of the late James B. Ewart. It was indorsed "J. M. Babington, Agent of the Executors late J. B. Ewart." Mr. Babington swore he had authority to indorse for the estate, and he produced it, and said he was acting under that power; he had indorsed several promissory notes for the estate of Ewart. He proved that the defendant William Notman lived in Hamilton; the other three lived together. Defendant Meredith managed the estate of the late William Notman, and was so managing when Babington received this note. He also gave some evidence as to the stamps.

The manager of the plaintiffs' bank proved that after these notes fell due, defendant William Notman asked him for a statement of the amount due by his father's estate, of the notes held by the bank. The witness asked this defendant if Meredith was one of the executors, and he answered, "No, but he acts for them." The witness furnished him with a statement in writing.

The defendant Mary W. Notman was called by the plaintiffs, and stated that she was an executrix under her father's

will. (It was admitted that Jane Meredith, this witness, and William Notman were executrices and executor, and that the testator died on the 19th September, 1865.) This witness proceeded to say that defendant Meredith had managed the affairs of the estate ever since testator's death: that she had never been consulted about the matters of the estate, but left it to Mr. Meredith to do what he thought best, which she explained, to do what was best in winding up the affairs of the estate; *she never gave him any power to make her personally liable*; she was not aware there were any notes; knew nothing of it. Her brother William (defendant) was absent when testator died, and returned about the 9th January, 1866, and since his return she had not consulted with any one.

The plaintiffs' cashier proved that these notes were brought to him by Mr. McIntyre, for whom they were discounted, and who in the beginning of 1863 owed the plaintiffs from \$70,000 to \$80,000, and owed about the same sum when these notes were given; he did not ask McIntyre how he came to get the notes; the form of the notes did not strike him as singular; he did not know who were the executors of the late William Notman, and did not then give credit to them personally, and did not then at all consider the solvency of the makers. One note was payable to the executors late James B. Ewart, another to James McIntyre, and the other two to James McIntyre & Co., in liquidation, and all were signed thus, "The executors of the late Wm. Notman, per pro. James S. Meredith." Two of them bore date before defendant William Notman returned home.

A non-suit was moved for, on the following objections:—

1st. The action is brought against a married woman (Mrs. Meredith,) on her personal contract.

2. No proof of any authority on the part of James S. Meredith to bind the defendants; the admission by William Notman only admits that Meredith was acting for the estate, and Miss Notman denies any authority to him at all.

3. The notes were void under the Stamp Act.

✓ The learned Chief Justice ruled that as to the fourth plea

the verdict should be for the defendants: that as to the contract of the married woman, the question must be raised by plea in abatement or upon error; but he reserved leave to the defendants to move to enter a non-suit upon any of these objections, and he left it to the Jury, as a matter of fact, whether James S. Meredith was authorised to bind the executors personally, pointing out the difference between authorising or shewing that a party is winding up the business of an estate, and authorizing an attorney to sign notes which would bind an individual personally. He told the jury that as this action was joint against all the defendants, if the plaintiffs failed against any one the verdict must be against the plaintiffs as to all.

The jury found for the plaintiffs generally, \$2,697, with leave reserved to reduce it to \$1,238 56cts., or \$1,968 93 cts., or \$1,966 86cts.; or to enter a nonsuit.

Moss obtained a rule calling upon the plaintiffs to shew cause why a nonsuit should not be entered on the leave reserved, renewing the objections taken at *Nisi Prius*—including the objection that the note set out in the fourth count was not endorsed by the executors of the late James B. Ewart, but by one Babington, and that the words, “agent of the executors,” are mere description, and do not make this endorsement one by the executors; or to reduce the verdict, according to the leave reserved; or to arrest judgment, on the ground that it appears in the declaration that at the time the alleged causes of action accrued the said Jane Meredith was a married woman; or for a new trial on the law and evidence, and the weight of evidence. He cited *France v. White*, 1 M. & G. 731; *Mitchinson v. Hewson*, 7 T. R. 348; *Barlow v. Bishop*, 1 East 432; *Davidson v. Stanley*, 2 M. & G. 721; *Hay v. Goldsmid*, 2 Smith 79; *Murray v. East India Company*, 5 B. Al. 204; *Attwood v. Munnings*, 7 B. & C. 278; *Llewellyn v. Winckworth*, 13 M. & W. 598; *Heathfield v. Van Allen*, 7 C. P. 346; *Dick v. Gordon*, 6 Grant U. C. Chy. Rep. 394; *Furze v. Sharwood*, 2 Q. B. 388; *Leadbitter v. Farrow*, 5. M. & S. 345; *Ross*

et. al. v. Codd, 7 U. C. R. 64; *Richardson v. Hall*, 1 B. & B. 50; *Fenn v. Harrison*, 3 T. R. 761; *France v. White*, 1 Scott. N. R. 604; *Hogg v. Snaith*, 1 Taunt. 347; *Esdale v. LaNauze*, 1 Y. & C. 394; *Pole v. Leask*, 9 Jur. N. S. 829; *Chitty on Bills*, 25.

M. C. Cameron, Q. C., shewed cause, and cited *Burch v. Leake*, 7 M. & G. 377; *DeBlaquiere v. Becker*, 8 C. P. 167; *Lindus v. Bradwell*, 5 C. B. 383; *Green v. Kopke*, 18 C. B. 549; *Prescott v. Flinn*, 9 Bing. 19; *Auldjo v. McDougall*, 3 O. S. 199.

DRAPER, C. J., delivered the judgment of the Court.

This action is not brought against the defendants as executrices and executor of their father's estate. For though the promissory notes are all signed, the executors, &c., per procuration James S. Meredith, the notes are declared on as made by the individuals who fill that character, and not against them as executors. Any judgment obtained in this action would be *de bonis propriis*; it could not be *de bonis testatoris*, for the notes, the sole causes of action, were not made until after his death. They could not however set up want of consideration, for the forbearance or giving time for payment of a debt due by the testator, if he owed the debt represented by these notes, would have been a good consideration.—*Child v. Monins* (2 B. & B. 460), cited in *Barnard v. Pumfrett* (5 M. & Cr. 71). There is, however, nothing but the use of the name "the executors," &c., to connect these notes or the consideration for them with the testator.

The plaintiffs' right to recover does not depend upon Meredith having authority to manage and wind up the estate, of which the defendants (excepting himself) were executors, but upon whether he had authority to give promissory notes binding on those executors as individuals. As regarded the estate there was some evidence of authority, as least to wind up, and that might include authority to bring or defend actions, and for such purposes to use the defendants' names as executors, and the consequences might be in

some cases that the defendants would be liable *de bonis propriis*—for costs, for instance. But that is a very different thing from entering into a contract or promise on their part as individuals, and this is what the plaintiffs are claiming. There is no privity as to consideration between the plaintiffs and defendants or the testator. They get the notes from a person who is very largely indebted to them, and discount them for him.

That a power of attorney (and none is proven in this case) to demand, sue for and recover all debts and receive all moneys, does not authorize the attorney to indorse bills, is established by *Murray v. The East India Company*, (5 B. & Al. 210). *Hogg v. Snaithe*, (1 Taunt. 367) is a strong authority to the same effect. These with other cases were cited by Mr. Moss in his argument.

The burthen of proving the authority of Meredith was clearly upon the plaintiffs. They must show that the "*per procuration*" was a reality. They might have put it beyond all doubt by calling him; instead of this they rely on some of his statements, he being only a defendant for conformity, as husband of one of "the executors."

In winding up the estate Meredith may have required to raise money. Conceding that he had authority (of which there is no proof) to pledge or charge the real or personal property of the estate, it is a very different thing to charge the personal representatives of it in their individual capacity. Yet unless this is done this action fails.

But not only was there, as we think, no evidence to establish such authority affirmatively, but the evidence of Miss Notman, who was called as a witness by the plaintiffs, directly negatives its existence as regards herself; and if it be positively disproved as to her, the action equally fails.

Upon these two grounds, therefore—that though Meredith had sufficient authority as regarded the estate, none was shewn to render the executors individually liable, and that as to one defendant such authority was negatived by the unquestioned evidence of one of their own witnesses—we are of opinion the plaintiffs should be nonsuited, and that the

rule for that purpose should be made absolute. It is quite true that agency is a proper question for a jury, but they cannot be allowed to entertain the question if there be no evidence to support it.

This conclusion renders it unnecessary to consider the other points taken.

Rule absolute for nonsuit.

WADDELL V. CORBETT ET AL.

Application in Chambers—Subsequent application to the Court—Practice.

Where a Judge in Chambers discharged a summons to set aside a final judgment: *Held*, that an application to the Court for the same purpose must be by way of appeal from the order, not as an original motion, and that all the papers filed on the application in Chambers must be brought before the Court.

Quære, as to the right to file additional affidavits.

Robert A. Harrison obtained a rule calling on the defendants, Corbett, Murray, and Gay, to shew cause why the final judgment entered, and the taxation of costs, and issue of writ of *fieri facias*, and all proceedings had thereunder, or some of them, should not be set aside with costs, for irregularity, in this, that defendants were not in a position to enter such judgment so long as there were other issues on the record undisposed of, as disclosed in affidavits and papers filed; and why the order of the Honourable Mr. Justice Hagarty, dated 6th July, 1866, discharging with costs the plaintiff's summons asking for the foregoing, should not be discharged, on the ground that the plaintiff was in law entitled to have said summons made absolute as to some of the matters therein contained, as disclosed in affidavits and papers filed, with leave to the plaintiff to refile on this application such papers already filed in Chambers as he might deem necessary for the purpose of this application, and on reading the papers and affidavits filed.

Gwynne, Q. C., shewed cause. He objected that the application could not be entertained as an original motion, but must be by way of appeal from the Judge's order:—that it was not made by way of appeal; and that all the papers filed on the application in Chambers were not before the Court. He cited *Warman v. Halahan*, 6 Jur. N. S. 1301; *Mitchell v. Harding*, 5 L. T. Rep. N. S. 348; *Pocock v. Pickering*, 21 L. J. Q. B. 365; *Brown v. Bamford*, 9 M. & W. 42; *Teggin v. Langford*, 10 M. & W. 556; *Shortridge v. Young*, 12 M. & W. 5; *In re Stretton*, 14 M. & W. 806; *Tinkler v. Hilder*, 4 Ex. 187; *Wearing v. Smith*, 10 Jur. 924; *Hallett v. Cresswell*, 10 Jur. 266.

Robert A. Harrison, contra.

DRAPER, C. J., delivered the judgment of the Court.

As to the preliminary objection, we agree with Mr. Gwynne, that if a Judge's order is moved against, everything which he had before him, which furnished the materials and foundation for his decision, must be brought before the Court. This it appears has not been done here, and therefore the second branch of this rule must be refused. But we are of opinion that an application to a Judge in Chambers which fails creates no bar to a subsequent independent application to the Court for the relief desired. None of the cases cited are adverse to this proposition, and those which most resemble the present case rest upon some special reason not applicable here.

There seems a distinction, though it is not recognized by authority of decided cases, between applications to set aside an *order* made by a Judge at Chambers and a discharge of a summons simply refusing what the summons asked for. In the former case, all that was before the Judge must be brought before the Court, and it has been said *only* what was before the Judge, which would appear the true principle if the application to the Court is to be considered as an appeal.

Still in *Sanderson v. Procter* (10 Ex. 187), the Court

received an affidavit not before the Judge, and in *Smith v. Goldsworthy* (2 Q. B. 717), an application to plead certain pleas was entertained, though a Judge at Chambers had refused leave to plead them, without bringing his order and the rule to plead founded thereon before the Court; and this case was acted upon in *Hallett v. Cresswell* (10 Jur. 266).

On the other hand, *Warman v. Halahan* (6 Jur. N. S. 1301), decides that where a plaintiff having recovered by action in the Superior Court a sum under £20, has applied to a Judge at Chambers for an order for his costs under Stat. 15 & 16 Vic. ch. 54, sec. 4, and such order has been refused, he can only apply to the Court by way of appeal, and not by original motion. *Mitchell v. Harding* (5 L. T. Rep. N. S. Q. B. 348), approves and follows this decision of Crompton, J., in *Warman v. Halahan*; and on the objection that the application was by original motion, the Court of Queen's Bench discharged the rule without costs, though they subsequently granted a rule *nisi* upon the production of an affidavit stating what the materials were which had been produced before the Judge in Chambers.

Upon this preliminary objection the rule must therefore be discharged.

Rule discharged. (a)

(a) See *Small v. Eccles*, 1 U. C. L. J. 122, N. S.; *Jackson v. Shorter*, Weekly Notes for 1867, p. 44, C. P.

MEMORANDUM.

During this Term the following gentlemen were called to the Bar :—JOHN PARKER, THOMAS, AMZI LEWIS MORDEN, MICHAEL WALSH, DANIEL MCCARTHY DEFOE, GEORGE DENMARK, ARCHIBALD BELL.

HILARY TERM, 30 VICTORIA, 1867.

(February 4th to February 16th.)

Present:

THE HON. WILLIAM HENRY DRAPER, C.B., C.J.

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

IN THE MATTER OF GUILLOT AND THE SANDWICH AND WINDSOR GRAVEL ROAD COMPANY.

Sheriff's sale of stock—Mandamus to transfer—Demand and refusal—C. S. C. ch. 70.

On application for a mandamus to a road company to transfer stock to a purchaser thereof under execution—*Held*, that a demand and refusal after service of the attested copy of execution, was essential, under C. S. C., ch. 70; and for want of it the rule was discharged with costs.

The execution debtor was the president of the company, and on shewing cause affidavits made by him were filed, asserting payment of the execution before the sale, &c. *Held*, that this could not justify the company in refusing to transfer, for they had no concern with the transactions between the execution plaintiff and defendant, or between that defendant and the Sheriff.

Quere, as to the effect of a delay in serving the attested copy beyond the ten days after the sale prescribed by the act.

Prince, Q.C., obtained a rule *Nisi* for a peremptory writ of mandamus to the road company to transfer two shares of their capital stock to the complainant, which shares he had purchased at a Sheriff's sale upon an execution against the goods and chattels of Charles Baby, at the suit of Drouillard et al.

The affidavits on which the rule issued stated the following facts:

1. That upon the 1st February, 1866, the applicant purchased at Sheriff's sale by auction two shares in this company for £10 10s., which he then paid to the Sheriff, the same being the highest bid.

2. That the applicant afterwards (not stating when) notified the company through their president (not naming him) of his purchase, and requested that the sale might be entered as a transfer in the books of the company, which had not been done, and the president told him it should not be done, as he did not recognize the validity of the sale.

3. That the company is a corporation formed under the Joint Stock Companies Act for formation of roads in Upper Canada; that the secretary and treasurer thereof then and since resided in Detroit.

4. That the Sheriff never was aware of any place where service of process on the company could be made.

5. That the said Charles Baby was then their president.

6. That so soon as he could find the secretary and treasurer in Canada the Sheriff caused an attested copy of the writ of execution and certificate of sale, pursuant to the statutes, to be served upon him.

7. The said Charles Baby informed the Sheriff that he did not intend to recognize the sale, because, as he alleged, nothing was due on the writ of execution.

8. That Josiah Strong, secretary and treasurer of the company, was served on the 10th of March, 1866, with an attested copy of the writ of execution, on which was indorsed the Sheriff's certificate of the sale.

9. That after the sale Mr. Prince, the applicant's solicitor, met Mr. Strong, and inquired of him whether there was any place in Canada where the company could be served with process, and he replied he was not aware of any: that the solicitor then informed him of the sale, and that he wished to have the legal notification of it properly served on the company, on which Mr. Strong begged he would wait a few days, and he would see what could be done; and a few days afterwards he referred the solicitor to the president of the company: that the solicitor applied to the said Charles Baby,

who he understood was the president, and requested that the shares should be transferred in the books of the company to Guillot, and Baby answered to the effect that the solicitor or his client knew their legal rights, and could pursue what course they pleased ; and the solicitor told him that a mandamus would be applied for.

Holmested shewed cause, and filed affidavits involving statements partly in relation to the company, partly to Mr. Baby as the execution debtor.

As to the first, Mr. Baby swore that he was and had been secretary to the company since its formation on the 3rd of February, 1852 : that since then the company had appointed their regular officers, and on the 18th December, 1865, they appointed for the then ensuing year Dr. Charles Casgrain, president, Josiah Strong, treasurer, and the said Charles Baby, secretary : that the president resided in the town of Windsor ; that he (Baby) as secretary kept the proceedings of the company in a book at his office in Sandwich, and that they had always been accessible to the public, and that the Sheriff knew it, and had examined the same, and had corresponded with Baby as secretary.

The residue of Mr. Baby's affidavit related to his personal interest as execution debtor. He swore that before the sale he paid to the Sheriff the amount of the execution and fees, the poundage (\$26) excepted, and that the Sheriff sold in order to collect his poundage after written notice not to sell and a request to have his fees taxed, and after payment to him of 75 cts., the fees for taxation : that Guillot informed him that prior to the sale the Sheriff stated that Baby had forbidden it, but that the Sheriff having agreed to indemnify him, he (Guillot), at the request of the Sheriff, purchased the stock, and he held the Sheriff responsible if the sale was made void.

In reply, Guillot denied the truth of the statement so far as he was concerned, and he swore that this application was *bonâ fide* made on his behalf ; and the Sheriff swore that the proceedings of the company had not been kept in a book,

nor were they accessible to the public: that he applied to Baby to allow him to inspect the minute-book and papers; that no such book was produced, but "written memorandums on scraps of loose paper, which were represented by Baby to be the only minutes of the company's proceedings in his custody or possession." And he denied that Baby paid the amount of the execution, as stated by him, and said the shares were not sold for the purpose of collecting the poundage; that the money paid by Baby was not the balance of debt and costs; that he never refused to have his costs taxed; and never told Baby he would sell for the poundage.

Holmested, in shewing cause, objected that, under the Con. Stat. C. c. 70, a demand and refusal at or after the service of the copy of the writ of execution was requisite, and was not shewn; and that a mandamus would not lie, there being a remedy by action. He cited *Tapping on Mandamus* 18, 21, 22; *Hughes v. Mutual Fire Ins. Co. of Newcastle*, 13 U. C. R. 153; *Rex v. Dayrell*, 1 B. & C. 485; *Rex v. The Brecknock and Abergavenny Canal Co.*, 3 B. & Ad. 217; *McMurrich v. The Bond Head Harbour Co.*, 9 U. C. R. 333.

C. Robinson, Q.C., supported the rule, citing *The School Trustees of Otonabee and Casement*, 17 U. C. R. 275; *The School Trustees of Toronto and the Corporation of Toronto*, 23 U. C. R. 203; *Goodwin v. Ottawa and Prescott R. W. Co.*, 21 U. C. R. 186.

DRAPER, C. J., delivered the judgment of the Court.

We feel strongly inclined to hold that there was sufficient evidence of demand and refusal, if it appeared that at the time the demand was made Guillot was in a situation to make it.

He is a purchaser at Sheriff's sale, under an execution against the goods and chattels of Charles Baby, of two shares in the Windsor and Sandwich Gravel Road Company. The sale was on the 1st of February, 1866, and Guillot swears that after the sale he notified the president, and requested

that the transfer might be made, which the president refused. He does not give the president's name, nor fix the date of this request. It may have been directly after the sale or directly before he swore to his affidavit (23rd May last).

The attested copy of the execution was not served on Mr. Strong until the 10th of March, 1866.

We infer from the account given in Mr. Prince's affidavit of his conversation with Mr. Strong and Mr. Baby, that the copy of the execution was not served until after both these conversations, and hence we must conclude that there was no demand after the 10th March, 1866. Guillot's request to the president was refused. On this he probably consulted Mr. Prince, who then applied for information whether there was any place in Canada where papers could be served on the company, both to Mr. Strong and to Mr. Baby. On getting the latter's answer he naturally caused the writ of execution to be served, and there is no proof of demand and refusal after this, which proof we take to be indispensable. For want of it we think the rule must be discharged with costs.

At the same time it is only right to the applicant to say that we think the company cannot justify their refusal upon the transactions between the plaintiff and defendant in the execution, or between that defendant and the Sheriff; they have no concern with either.

It is the Sheriff's duty within ten days after the sale to serve the company with an attested copy of the execution, and his certificate endorsed thereon, certifying to *whom* the share or shares have been sold *and the person who has purchased the same*, and the statute says the proper officer of the company *shall enter* such sale as a transfer. The company having been served have a duty to discharge, *i.e.*, to make the transfer. They are not a tribunal to decide upon the validity of the sale, nor to act upon the interested *ex parte* representations or conclusions of one of their own officers. All they are concerned with is, the service on them of what the law requires. If the Sheriff has done wrong he is

responsible. A delay beyond the ten days in making the service would, we presume, protect the company as well as a *bonâ fide* purchaser in respect of anything done pending such delay; but unless the delay afforded evidence of a waiver of the sale, we are not prepared to say that, after service of the necessary papers, the company would not be bound to make the transfer to the purchaser named in the Sheriff's certificate, if the shares were at the time of the service still standing in the name of the execution debtor.

Rule discharged.

THE PRESIDENT DIRECTORS AND COMPANY OF THE GORE
BANK V. CROOKS.

Executors—Power of attorney by—Endorsement under—Authority.

The plaintiffs sued defendant, who was an executor of E., as indorser of three promissory notes payable to "the executors of the late E.," two being endorsed "J. M. B., agent of the executors of the late E.," and the third "the executors late E., *per pro.* B." B. held a power of attorney from the executors, by which they as executrix and executors authorised him (among other things) for them as such executrix and executors to make and endorse all such promissory notes as might be requisite in the conduct and management of the estate. These notes it appeared were received by B. from the makers for debts due to the estate, and given by him, endorsed as above, to M., one of the executors, who was largely indebted to the estate, and was in difficulties, M. telling him that he wanted to get them discounted on his own account. They were so discounted by the plaintiffs, to whom M. owed a large sum, and who made no enquiries as to the extent of B's authority, or the circumstances under which M. obtained them. Defendant knew nothing of the matter until after the notes fell due. The Court being left to draw inferences of fact, and the question being the personal liability of the defendant—

Held—1. That the indorsements were sufficient in form; but, 2, that not being for the purposes of the estate they were not within the authority given to B., the extent of which it was the plaintiffs' duty to ascertain; and a non suit was ordered.

Quære as to the effect of a power given by an executor. *Semble*, that it may authorize the attorney to charge him by acceptances, &c., in his own right, for otherwise it would be illusory, but only for the payment of testator's debts.

THE declaration contained three counts. The first stated that the executors of the late William Notman, on the

2nd of December, 1865, by their promissory note now over-due, promised to pay to the order of the defendant, under the name and style of "the executors of the late James B. Ewart," at the Gore Bank, in Hamilton, three months after date, \$700, and the defendant under the name and style aforesaid endorsed the said note to James McIntyre and Co., who indorsed the same to the plaintiffs. Presentment, dishonor, and notice were averred.

Second count—that one A. W., on the 1st October, 1865, by his promissory note now over-due, promised to pay to the defendant under the name and style of "the executors of the late J. B. Ewart," at the Bank of British North America in Hamilton, three months after date, \$786 37 cts., and the defendant under the name and style aforesaid endorsed the said note to James McIntyre & Co., who endorsed the same to the plaintiffs. Presentment, &c.

Third count—that the said A. W. on the 10th of January, 1866, by his other promissory note now over-due, promised to pay the defendant, under the name &c., (as before) three months after date \$800 38 cts.; endorsements as before, and presentment, &c.

Pleas—1st, Did not endorse under the name and style of "the executors of the late James B. Ewart." 2d, Denial of due notice. These two pleas were separately pleaded to each count. Issue joined.

The trial took place at Hamilton, in October last, before Richards, C. J.

Evidence was given that the late William Notman being in his lifetime indebted to the estate of J. B. Ewart, had given his promissory note on account thereof, and that since his death his (Notman's) executors had given renewal notes from time to time, of which this was one.

Williams, the maker of the other two notes, rented a farm, part of the estate, and being in arrear gave these notes.

The note first declared upon was signed "The executors of the late William Notman *per pro.* James S. Meredith," and was indorsed "J. M. Babington, agent of the executors of the late J. B. Ewart."

The note given in evidence under the second count was in fact dated 4th October, not 1st, and was indorsed in like manner as that in the first count.

The last note was indorsed "the executors of the late J. B. Ewart, *p. pro.* J. M. Babington."

Probate of the will of James Bell Ewart, as to rights credits and chattels in Upper Canada, was granted on the 10th of January, 1854, to his widow Mary Margaret, executrix, and to James McIntyre and Adam Crooks executors therein named.

Babington had a power of attorney from the three Canadian executors, dated 6th January 1854, by which Mrs. Ewart as *executrix* and McIntyre and the defendant as *executors* appointed him their attorney, for them as such executrix and executors to make, draw, accept and indorse all and every promissory notes, drafts, bills of exchange, bankers checks, and orders for payment or receipt of moneys, as might be requisite in the conduct and management of the affairs of the estate of the deceased, James Bell Ewart, and to receive or pay respectively all and every the moneys arising therefrom or payable thereby respectively.

Babington was examined at the trial, and swore that he gave the notes which he received on account of Ewart's estate to James McIntyre, one of the executors, who was made a defendant in the original summons in this cause, but died before declaration. He was called upon by the plaintiffs on the 4th April, 1866, to pay two of the notes sued upon. At that time both McIntyre and the defendant were ill; the former died on the 8th of August following. About the 7th of May, Babington told the defendant of these notes. This appeared to have been the first notification he had of them. There were at that time other liabilities of the Ewart estate in other banks. McIntyre was nearer at hand to Babington, and the communications were made to him. Both Babington and McIntyre had been clerks to Ewart, but McIntyre had gone into business on his own account before Ewart died. He lived in Dundas, and the defendant in Toronto.

When Ewart died, there was a quantity of wheat on hand, which it became necessary to flour; there were also notes current in the Banks, and it was necessary to carry forward that paper until the flour was realized from; and the power of attorney was given to satisfy the British Bank, with whom Ewart had transactions. His own account was with that Bank, and the executors carried on their account in that Bank, and the transactions of the estate were solely through that Bank. The power of attorney was given to Babington to be used with that Bank, and he left a copy of it with them. He said he supposed all Ewart's debts were discharged by 1855, and the debts due to his estate were got in as far as practicable by that time. There was a large surplus invested in mortgages and debentures; the securities were left in his hands. Before 1861, McIntyre had been receiving moneys of the estate, which Babington could not get from him, and defendant requested him to render an account. A course of business instructions was adopted in reference to the estate, and entered in a book. They were as follows: "Open Bank account in the name of 'J. M. Babington, agent of the executors of J. B. Ewart's estate,' with the Bank of British North America here." (That is at Dundas.) "All moneys received from time to time to be deposited to credit of this account. All moneys withdrawn to be by cheque. Such drafts and notes on the business of the estate as may be required to be taken from debtors to the estate to meet requirements of income may (if necessary) be discounted on this account." The defendant alone signed them, and a copy was handed to McIntyre about the 3rd of December, 1864. Defendant was not aware of the transfer of the cash account of the estate.

The notes declared on were obtained by Babington at McIntyre's direction, and McIntyre got them and discounted them for his own use, and the third note was only a renewal of the second, and was given to McIntyre to retire the second. Babington endorsed the last note at McIntyre's request. He said he thought McIntyre, being an executor, had a right to use the funds of the estate. So far as

Babington knew, the defendant's first knowledge of these notes was from the letter of the 4th April. Babington received two notices of the non-payment of the note for \$800.38, and these were the only notices of non-payment of any of the notes which he received prior to the 4th April. He referred Mr. Cassels, the plaintiffs' cashier, to the defendant in the beginning of May, and had nothing further to do with it. He gave Mr. Cassels a copy of the power of attorney, about the 16th April, 1866; before then no one on the plaintiffs' behalf had asked for a copy or to see the original. Defendant did not, to Babington's knowledge, authorize the communication of the power of attorney to any one but the British Bank.

Another note was produced and shewn to Babington, dated 8th September, 1865, for \$800, payable at four months to executors of estate of J. B. Ewart, and endorsed, "For executors of J. B. Ewart, James McIntyre acting executor." When McIntyre got the three notes sued upon from Babington, he (McIntyre) owed the estate a pretty large amount. Babington said there was no revocation of the power of attorney: that he put the names of the executors on the notes because McIntyre desired it: that when McIntyre got any of the notes of the estate, the amount of them was charged to his debit as so much money received by him. He gave the only notices of non-payment which he received to McIntyre; the defendant never saw them. He said he did not suppose McIntyre was committing a fraud by discounting the notes, as he said he would retire them. McIntyre said he wanted to get these notes discounted on his own account, and Babington presumed he had a right to endorse them under the power of attorney.

Several objections were taken on the part of the defendant, on which leave was reserved to him to move for a non-suit, and Mr. Cassels, the plaintiffs' cashier, was called for defendant.

He proved that on the 1st May, 1866, he wrote to defendant a letter stating that Babington, agent of the executors of the late J. B. Ewart, referred to defendant as one of

the executors in reference to the three notes sued upon, and requesting to be informed what arrangement he proposed regarding the matter. The defendant replied that he did not recognize the promissory notes, or any liability of the estate of the late J. B. Ewart in respect thereof. Mr. Cassels stated this was the first application to defendant individually. He knew that defendant lived in Toronto, but till Babington told him he did not know defendant was to be referred to in dealing with these transactions. He said McIntyre & Co. were ordinary business customers of the Bank, and when he (Mr. C.) assumed the management in 1863 their liabilities to the Bank amounted to \$80,000 or more. McIntyre applied to him to have these notes discounted on account of McIntyre & Co., and they were so discounted and the proceeds placed to their credit in the usual way. He was not aware of the circumstances under which McIntyre got these notes, or that there was anything peculiar in them. In consequence of the letter of the 4th April, Babington called upon him, and said the matter would be arranged, and proposed to transfer a mortgage for \$700, which he held, as part security. Afterwards he referred the witness to the defendant.

The learned Chief Justice stated, that it seemed the defendant, with the other executors, authorized Babington to endorse notes for the estate of J. B. Ewart, and the notes sued on were endorsed by him, so that there was evidence of an endorsement in fact, subject to the objections taken. He asked the jury to say whether proper notice of dishonour in fact was given as to the two first notes, and if they thought that the defendant when authorizing such notes to be endorsed, intended the notice to be sent to Dundas, then were the notices so sent? If sent, were they addressed to the executors of James B. Ewart, or were they addressed to Babington as agent for the estate?

It was understood between the parties that a verdict should be entered for the plaintiff for \$829.97, with leave to move to enter a nonsuit on the points raised by defendant, and with leave to the plaintiffs to increase the verdict by the

sum of \$1558.22, the amount of the first two notes; the Court to be at liberty to draw inferences of fact. The jury found that the notice to Babington was sufficient, and that it was addressed to him as agent of the executors of Mr. Ewart.

In Michaelmas Term, *M. C. Cameron*, Q.C., obtained a rule calling upon the defendant to shew cause why the verdict should not be increased by the sum of \$1558.22, or by such other sum as to the Court should seem just, pursuant to leave reserved.

In the same Term the defendant in person obtained a rule calling upon the plaintiffs to shew cause why a nonsuit should not be entered, on the following grounds, taken at the trial:

1st. As to the issue on the first and second pleas of *non indorsavit*, the indorsement by Babington was only by him as an individual, and not by procuration of the defendant. As to the issue on the third plea of *non indorsavit*, the indorsement purports to be that of the executors of J. B. Ewart, and is not in law or in fact the endorsement of the defendant personally. As to these issues, there was no authority in law or in fact under which Babington could endorse any of the promissory notes sued on so as to make the defendant personally liable.

2nd. As to the issues on the three pleas, that there was no due notice of dishonour; there was no legal notice proved to have been given to the defendant, and no notice of any kind sent or addressed to the defendant.

Or for a new trial, on the ground of misdirection, in directing that Babington had authority to indorse the notes sued upon, so as to make the defendant personally liable thereon, and that there was legal evidence from which the jury could infer that the notice of dishonour of the notes had been properly addressed and given so as to make the defendant liable, and that such notice need not have been sent or addressed to the defendant's usual place of residence; or for a new trial on the ground that the verdict entered for the plaintiffs on the issues raised under the third count of the declaration is

contrary to law and evidence, there being no legal evidence to make the defendant liable for the endorsement of the promissory note set forth in the third count, and there being no legal evidence of notice of the dishonour of the said note being given to the defendant.

The two rules were argued together in this Term.

The Defendant in person cited *Armour v. Gates*, 8 C. P. 548; *Leadbitter v. Farrow*, 5 M. & S. 349; *Lewis v. Nicholson*, 18 Q. B. 503; *Deslandes v. Gregory*, 2 E. & E. 602; *Bottomley v. Fisher*, 1 H. & C. 211; *Alexander v. Mackenzie*, 6 C. B. 766; *Brown v. Byers*, 16 M. & W. 252; *Fenn v. Harrison*, 3 T. R. 757, 4 T. R. 177; *Attwood v. Munnings*, 7 B. & C. 278; *Davidson v. Stanley*, 2 M. & G. 721; *Fearn v. Filica*, 7 M. & G. 513; *Hogg v. Skeen*, 18 C. B. N. S. 426; *Stagg v. Elliott*, 9 Jur. N. S. 158; *Pole v. Leask*, 9 Jur. N. S. 829; *Crosse v. Smith*, 1 M. & S. 545; *Commercial Bank v. Woodruff*, 21 U. C. R. 607; *Lawson v. Sherwood*, 1 Stark. 314; *Barnes v. Ewing*, L. R. 1 Ex. 320; *In Re Leeds Banking Co.*, L. R., 1 Equ. 1; *Chitty on Bills*, 25, 146, 298, 299, 319, 416.

M. C. Cameron, Q. C., for the plaintiffs, cited *Auldjo v. McDougall*, 3 O. S. 199; *Lindus v. Bradwell*, 5 C. B. 583; *Green v. Kopke*, 18 C. B. 549; *Housego v. Cowne*, 2 M. & W. 348; *Childs v. Monins*, 2 B. & B. 460; *Williams on Exrs.* 6th Ed. 1614; *Ross v. Codd*, 7 U. C. R. 64.

DRAPER, C. J., delivered the judgment of the Court.

The case may be conveniently considered upon the form of the endorsement as legally binding on the defendant, and whether Babington had authority to bind defendant as an individual.

Both sides agree that the question is the individual personal liability of the defendant, not the liability of the estate of J. B. Ewart, through the medium of the executors.

It may be that Babington endorsed in a form which made himself liable, and yet that the defendant would also be liable.

In *Attwood v. Munnings* (7 B. & C. 283) Bayley, J. observes that where an acceptance imports to be by procuration, any person taking such a bill ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority. We assume the same principle is applicable to an indorsement of a promissory note purporting to be made by an agent. *Fearn v. Filica* (7 M. & Gr. 513) is a strong authority to shew the necessity of enquiring into the authority of an agent to endorse; and *Alexander v. McKenzie* (6 C. B. 766) confirms to the fullest extent the doctrine of these and similar cases; and it has the more important bearing in the present instance, because as to the note to the executors of the late J. B. Ewart, the indorsement to the payees was indispensable to the putting it into circulation.

The cases cited of *Armour v. Gates* (8 C. P. 548), *Lead-bitter v. Farrow* (5 M. & S. 345), and *Deslandes v. Gregory* (2 E. & E. 602), relate more to the possible liability of Babington than the question of the defendant's liability, which it is at present unnecessary to consider. As to the mere form of the endorsement, looking at the whole facts, we incline to think it sufficient in form. Babington had a power of attorney from the executors, and who they were was established by that power and the probate of the will. The defendant was clearly one of them.

The case of *Gardner v. Baillie* (6 T. R. 591) would however, taken in its letter, establish that the defendant could not be made personally liable under this power of attorney, for it decides, and after some days delay, that a power of attorney given by an executrix to act for her *as executrix*, does not authorize the accepting of bills of exchange to charge her in her own right, though for debts due to the testator. The bill in that case was represented as drawn upon the defendant as executrix. The power of attorney did not in terms embrace the acceptance of bills, or making promissory notes, or indorsing. The authority in the present case, with that difference, is not to be distinguished. It extends in

express terms to bind the donors only as executrix and executors, and if that limitation is strictly applied the authority to make, draw, accept, and endorse bills and notes, would be illusory, as such act could only be binding on the donors in their personal capacity. But in *Howard v. Baillie* (2 H. Bl. 618), in an action on another bill of exchange accepted under the same power of attorney, where the plaintiffs obtained a verdict, the Court of Common Pleas refused a new trial; and in a very elaborate judgment the Lord Chief Justice intimates a clear opinion that the attorney had power to accept. He however qualified the judgment by this sentence, "We agree that this power cannot authorize the giving acceptances in the name of Mrs. Baillie, *which are neither expressed nor proved to be in payment of the testator's debts.*" We shall have occasion to refer to this qualification hereafter.

The position of McIntyre as one of the executors, and the effect of that position in relation to the transfer of these notes to the plaintiffs, must not be overlooked. During the argument he was spoken of as the managing executor, being the only one who lived at Dundas, where the business of the estate principally lay. The evidence does not lead me to the conclusion that his position or authority was distinguishable from that of the executrix or the defendant. In January, 1854, the power of attorney to Babington was given, constituting him the sole agent to manage the affairs of the estate. There was no revocation of this power. Babington gave evidence that Mr. McIntyre being the person nearest at hand, he communicated with him, but this was said in connection with a statement that he did not believe the defendant was aware of these three notes until about May, 1866. A promissory note was produced at the trial, dated 8th September, 1866, signed William Notman, *per proc.* James S. Meredith, payable at three months to the executors estate of J. B. Ewart, and endorsed "the executors of J. B. Ewart, James McIntyre, Act. Exr.," and afterwards indorsed "James McIntyre & Co., in liquidation," McIntyre having made an assignment. This note is stamped as the

property of the plaintiffs, but it was not suggested that McIntyre intended by indorsing it as executor to revoke Babington's authority, and in fact McIntyre procured all the notes sued upon to be indorsed by Babington after this act of his. There was no evidence of any similar act of McIntyre's, though apparently before the 15th October, 1864, he had both received and paid moneys for the estate, had made remittances to Mrs. Ewart, in England, and was to some extent in arrears to the estate.

The burden of proof is clearly on the plaintiffs to establish such an agency in Babington as will charge the defendant in this suit. It was their duty primarily to ascertain the fact of his agency and its extent. So far as Mr. Cassels' evidence shews, and he acted for the plaintiffs, he never saw or asked to see Babington's authority to indorse until these notes were overdue. He was apparently ignorant up to that time that the defendant was an executor of the Ewart estate, though he may from the indorsement on the note of the 8th September, 1865, have known that McIntyre professed to be one of the executors. That this was on the plaintiffs' part an omission of a necessary inquiry is beyond dispute, and a reference to the case of *Pole v. Leask* (9 Jur. N. S. 829, cited by the defendant), puts this position beyond all question.

If the power of attorney had been inspected, it would have rendered necessary a further enquiry, suggested by the limitation in it—namely, whether these indorsements by Babington were “requisite in the conduct and management of the affairs of the estate of Ewart.” As Bayley, J., observes in *Attwood v. Munnings* (7 B. & C. 285) it would be dangerous to hold that the plaintiffs were not bound to enquire whether the indorsements in this case were requisite for the purposes of that estate. It was certain that the notes were not discounted for the estate, and that the estate got no value for them; the discount was for McIntyre or McIntyre & Co., who, as Mr. Cassels proved, owed the plaintiffs \$70,000 or \$80,000, and whose estate was at the very time in liquidation. Unless there had been fraudulent concealment on the part of McIntyre and Babington, the

examination of the power of attorney would have led to the knowledge of the instructions of the 15th October 1864, to the knowledge that these indorsements and the tender of the notes for discount were in opposition to these instructions, and that the transaction was for McIntyre's convenience, and not for the conduct or management of the estate. Once informed that defendant was an executor, knowing McIntyre's embarrassed position, and seeing the limited character of Babington's authority, common prudence would have dictated a reference to the defendant, and that reference made in proper time would have rendered the discounting these notes impossible. We confess we do not understand Mr. Babington's conduct, especially after the instructions of October 1864, coupled with his knowledge that McIntyre wanted to discount these notes for his own purposes. Possibly, we would hope probably, he was not aware of McIntyre's difficulties and heavy indebtedness. If he had been, his conduct would subject him to very painful suspicion.

On the whole, we are of opinion, being left to draw conclusions of fact, as well as to decide upon the law, that these indorsements were not made by Babington within the scope and meaning of the power to him, or according to the intention of the parties who executed it, and, if not morally, were legally a fraud upon the estate: that it was the duty of the plaintiffs, who of necessity required an indorsement binding upon the payees of these notes, when that indorsement was by a party who professed only to be agent or to sign per procuration for them, to ascertain his authority; that they wholly neglected to make this enquiry, the necessity for which was increased by the fact that they were discounting the notes for a person in embarrassed circumstances;—and we conclude from these premises that the plaintiffs fail to establish the issue against the defendant that he endorsed either of these notes. Therefore the defendant's rule to enter a nonsuit should be made absolute, and the plaintiffs' rule should be discharged.

*Rule absolute for nonsuit.
Plaintiffs' rule discharged.*

SCRAGG V. THE CORPORATION OF THE CITY OF LONDON.

Assessment—City property—Appeal—C. S. U. C. ch. 55, sec. 2, sub-sec. 7.

Held, that property owned by a city, but leased by them to an occupant for his own private purposes, is liable to taxation—Morrison, J., dissenting.

Held, also, following the latest decision of this Court, *The Great Western R. W. Co. v. City of Toronto*, 25 U. C. R. 570, that a person assessed for property exempt from taxation, who has appealed to the Court of Revision (but not to the County Court Judge), is bound by their decision.

REPLEVIN.

Avowry—that heretofore, and before and at the time of the taking of the said goods and chattels, the plaintiff was the occupant or tenant of part of lot number 15 on the south side of Dundas street, in the said City of London, (describing it), and was rated as such occupant or tenant upon the assessment roll and on the collector's roll for said city for the year 1865, for \$87.86, taxes in respect of the said lands and premises duly imposed upon the said lands and upon the said plaintiff in respect thereof, by the defendants, according to law; and the plaintiff being so rated as aforesaid, and having neglected to pay the said taxes, to wit, the said sum of \$87.86 so imposed as aforesaid, for the space of fourteen days after demand made upon him for payment of the said taxes by the collector for the said city, according to law, they, the defendants, by virtue and under the authority of a certain Act of Parliament of the Province of Canada, called "The Assessment Act" (Consol. Stat. U. C. cap. 55), seized and distrained the said goods and chattels in the declaration mentioned, on the said lands and premises, as and for a distress for the said sum of \$87.86, taxes due by the plaintiff as aforesaid, as they lawfully might, wherefore the defendants pray judgment, &c.

Plea to the avowry—That defendant became the tenant or occupant of the said lot number fifteen, as in the said avowry mentioned, after the passing of a certain Act of the Parliament of the Province of Canada, called "The Assessment Act" (Consol. Stat. U. C. cap. 55), and that the said act

was in full force from and at the time he became such tenant or occupant, until and at and after the time of making the said distress; and that at the time the plaintiff became such occupant or tenant, and at the time he was so rated upon the said assessment roll, and on the said collector's roll, and at the time of the said distress, the said lot number fifteen was property belonging to the City of London.

First replication—That the said lands in the said avowry mentioned were at the time the said assessment was made, and at the time the said taxes were rated and imposed, and from thence hitherto, occupied by the plaintiff for his own purposes as a tavern, under a lease thereof from the defendants to the plaintiff, dated the 1st of July, 1862, and then and now unexpired, at the yearly rent of £82 10s. and taxes, which the plaintiff by the said lease covenanted with the defendants that he would pay and discharge; and the said lands were not occupied for the purposes of the said City of London or unoccupied.

Second replication—That after the said assessment was made, and before the passing of the by-law for imposing said taxes, the plaintiff appealed to the Court of Revision of the Municipality of the said City of London against the said assessment, and the said appeal was by the said Court of Revision heard and adjudicated upon, and the same was by the said Court disallowed and dismissed, and the assessment roll was finally passed by the said Court without any amendment or alteration in the said assessment being made, of which the plaintiff had notice. And the defendants say that the plaintiff acquiesced in such decision and determination of the said Court, and did not appeal from the same to the Judge of the County Court of the County of Middlesex, in which county the said municipality lies.

Demurrer to the plea, on the grounds,—1. That the said plea does not, as it should in order to constitute an answer to the avowry, bring the case within the exemptions contained in the statute in the plea referred to. 2. That the said plea does not allege or shew that the property upon which or in respect of which the taxes were imposed was

occupied for the purposes of the City of London or unoccupied; but, on the contrary, the plea shews that it was not so occupied or unoccupied. 3. That the property aforesaid is not on the plaintiff's own shewing exempt from taxation.

Demurrer to the first replication, on the grounds, 1. That the property assured, being the property of the City of London, was not liable to taxation. 2. That the exemption from taxation was absolute, and in no way restricted or qualified, whether the same was occupied by the plaintiff for his own purposes or otherwise.

Demurrer to the second replication, on the grounds, 1. That the property assessed being the property of the City of London, any assessment or taxation thereupon was null and void. 2. That such assessment and taxation being void and illegal, no taxation or assessment could be imposed thereupon. 3. That such assessment and taxation being void *ab initio* and illegal, and the said property in respect of which the taxation and assessment was imposed being exempt by law from taxation and assessment, no laches or neglect on the part of the plaintiff in the prosecution of his appeal from the said Court of Revision to the Judge of the County Court, could make such taxation and assessment lawful or valid, or in any manner authorise the defendants to enforce the collection of the said taxes by distress or otherwise. 4. That no complaint or appeal by the plaintiff to the Court of Revision was necessary, inasmuch as the said assessment was void.

Robert A. Harrison, for the defendants. First. Is property owned by a Municipality and occupied by a citizen for his own purposes, liable to be taxed against him?

By section 9 of the Assessment Act, Consol. Stat. U. C. ch. 55, all land is *prima facie* taxable; but sub-section 7 is relied upon as exempting the property in question here, and by it is exempted "the property belonging to any county, city, town, township or village, whether occupied for the purpose thereof, or unoccupied. "Whether" in that clause means when. Here the land is not occupied for the purposes of

the city, and it is therefore not exempt. It must be contended on the other side that the clause exempts all property of a municipal corporation, whether occupied or unoccupied, but that is not what the section means. The exemption in sub-sections 1 and 2 as to Crown property, is more full. It exempts all property vested in or held by Her Majesty or in any public body, &c., in trust for Her Majesty, and all property held by Her Majesty or any person in trust for or for the use of any tribe of Indians, "and either unoccupied or occupied by some person in an official capacity;" and it is then added, that when any such property "is occupied by any person otherwise than in an official capacity, the occupant shall be assessed in respect thereof, but the property itself shall not be liable." That, though more fully expressed, is in effect the same as sub-section 7. [HAGARTY, J. In England, if you occupy Crown property and have a beneficial interest in it, you are liable to the Poor rate.] Yes, *The Commissioners of Leith Harbour v. The Inspector of the Poor*, L. R. 1, Scotch App. 17, shews that. Other sections of the act tend to throw light on the question. Section 19, which prescribes the duties of the assessors, contains nothing authorizing them to exclude this property from the assessment roll. Section 22 directs that where land is not occupied by the owner, but the owner is known, it shall be assessed, if occupied, against both the owner and occupant. Section 24 provides that where land is so assessed "the taxes may be recovered from either or from any future owner or occupant, saving his recourse against any other person." In this case there could be no recourse, for it is admitted that the occupant covenanted to pay taxes, and section 26 only allows the deduction of taxes paid by the tenant from his rent if they could also have been recovered from the owner, "unless there be a special agreement between the occupant and the owner to the contrary," which is the case here. *Shaw v. Shaw*, 12 C. P. 456, is a case turning upon the exemption of Crown property.

Secondly. Having appealed to the Court of Revision, which decided against him, can the plaintiff now come here? In *McCarrall v. Watkins*, 19 U. C. R. 248, the plaintiff was

assessed as owner, being neither owner nor occupant, and he was held bound by the roll, not having appealed. *Marshall v. Pitman*, 9 Bing. 595, is a similar case in England; and in *The Corporation of Toronto v. The Great Western R. W. Co.*, 25 U. C. R. 570, the latest authority, the Court expressed a clear opinion to the same effect. Any previous decisions inconsistent with this must be considered as overruled.

Crombie for the plaintiff. As to the last point, the case in 25 U. C. R. 570, was decided on the ground that the Judge of the County Court had no right to send the case here, not that the parties could not bring up the point in this form of action. *Great Western R. W. Co. v. Rouse*, 15 U. C. R. 168, expressly decides that when property *not taxable at all* is assessed the decision of the Judge is not final. *Shaw v. Shaw*, 21 U. C. R. 437, is to the same effect, so also *Charleton v. Alway*, 11 A. & E. 998, there cited; and in *The Municipality of London v. The Great Western R. W. Co.*, 17 U. C. R. 264, the reason for so deciding is explained by Burns, J. These authorities cannot be treated as overruled by the later case, which went off on a different question.

As to the other point, the taxes here were not authorized. Where the Legislature intended to make the occupant of property liable, though the property was exempt, they have expressed the intention clearly, as in sub-sections 1 and 2, with regard to Crown property. If the argument on the other side is correct, then sub-section 7 would not include all the property of Municipal Corporations; if occupied by a tribe of Indians, for example, they would be assessable. "Whether" should not be read *when*, but *although*, or *notwithstanding*, otherwise the absurdity is involved of the city taxing itself; in no other way can the provisions of the act be carried out. [DRAPER, C. J.—If all Corporation property is exempt, what was the use or object of adding the other words, "whether occupied, &c."? We must give some effect to them if we can, according to the well-settled rule.] If this property is assessable, then under section 22 the

city must assess itself as owner, for there is no provision, as with regard to Crown lands, that the occupants only shall be liable, not the land. Then if the taxes are not paid when due, they are to be collected either from the owner or occupant, and the collector cannot return his roll until he makes oath, as required by section 106, that he has been able to discover no goods belonging to the parties charged with or liable to pay the tax. How could such an affidavit be made here, when the city as owner is one of the parties? All this difficulty is removed by the provision with regard to Crown property, exempting the owner, and the same care would have been taken with respect to Corporation property if the assessment of it had been contemplated; but as it stands the act cannot be worked out if such assessment is permitted. It may be contended, moreover, that this land is occupied for the purpose of the city, being leased by them to a tenant from whom they receive rent. The plaintiff must, at all events, succeed on the demurrer. Defendants avow under a distress for taxes. We say the property was not liable to taxation, and they reply that we agreed to pay taxes. That is no answer. Our agreement can give them no right to distrain; and besides, it is a departure.

Harrison, in reply. As to the decision of the Court of Revision being final: as a general principle, where parties voluntarily submit to a competent tribunal they are bound by it, as in the case of arbitration—*Williams v. School Trustees of Plympton*, 7 C. P. 559; and the case in 25 U. C. R. 570, is in accordance with this principle, while the authorities cited which conflict with it are not. Here the party not only may go to the Court of Revision, but the act makes it the only tribunal, and compels him to resort to it.

The words "for the purpose" of the Corporation, in the exempting clause are explained by reference to section 243 of the Municipal Institutions Act, Consol. Stat. U.C. ch. 54, which allows Municipal Corporations to obtain such real property as may be required for their use for a Town Hall, &c. Property occupied in that way for the personal use of

the corporation is intended. The word "*whether*" may mean also *if*, or it may be struck out altogether.

HAGARTY, J.—The questions for decision are, in substance—

1. Whether property owned by the Municipality, but leased by them to an occupant for his own use, unconnected with corporation purposes, is liable to taxation.

2. Whether the decision of the Court of Revision, to which the plaintiff appealed, is final, and bars this action, no appeal being lodged to the County Judge.

The first question is one of very great importance. The assessment Act (Consol. Stat. U. C. ch. 55), sec. 9, declares that "All lands and personal property in Upper Canada shall be liable to taxation, subject to the following exemptions, that is to say :"

Sub-sec. 7, "The property belonging to any county, city, town, township or village, *whether occupied for the purpose thereof, or unoccupied.*"

If the sentence had stopped at the word "village," the exemption would be universal; the addition of the subsequent words raises a difficulty.

It is right to examine the language used in the other exemption clauses :—All property vested in Her Majesty, or in any public body, &c., or person in trust for Her Majesty, or for the public uses of the Province, &c., &c.; and either unoccupied or occupied by some person in an official capacity"; and when occupied by a person otherwise than in an official capacity, "the occupant shall be assessed in respect thereof, but the property itself shall not be liable."

Sub-sec. 4.—The real estate of every university, &c., "so long as such real estate is actually used and occupied by such institution, *but not if otherwise occupied or if unoccupied.*"

It will be observed that in the last example the unoccupied land of a university, &c., is not within the exemption.

Then comes the exemption as to cities, &c.

We are bound to give effect if possible to all the words used. The sentence is very inexactly worded. It leaves the general exemption stated in the beginning of the sentence limited to property answering the description of "occupied for city purposes or unoccupied." It is not easy to see any other way of reading it, so as to give full effect to all the words, than thus, "The property belonging to any county, city, &c., occupied for the purposes thereof or unoccupied."

We cannot hold that the insertion of the word "whether" widens the exemption. The definition of this word is generally given "*which of two or several.*"—(Richardson's Dictionary, Imperial Dictionary.)

Adopting such a definition of the word "whether," the sentence might be read, "The property belonging to any county, city, &c., in either of these positions, viz., occupied for the purposes thereof or unoccupied."

If the sentence be thus read, "Whether property of a county, city, &c., be occupied for the purposes thereof or unoccupied, it shall be exempt from taxation," the meaning would be, we think, against the plaintiff's view.

To support the plaintiff's contention we must hold that these words, "All property of A. B., whether leasehold or copyhold," include also his freehold estates.

It is remarkable that sub-sec. 5, specially exempts town and city halls, court house, gaol, house of correction, lock-up house, &c., generally the property of the county or city. Other clauses in the section exempt certain properties as to specified portions thereof.

It is of course urged that in the case of corporation property the ultimate remedy by sale for unpaid taxes could hardly be applicable, and that *primâ facie* it could not have been intended that a municipal body having to raise a certain sum for its statutable requirements, should go through the form of taxing its own property.

To this it may be answered that the suggested difficulty would exist only in theory. Corporations generally possess some landed property, obtained by grant from the Crown or

by purchase, &c. A building used for corporate purposes may be destroyed or pulled down, and the ground be no longer required; in such case the natural course would be either to sell or lease it. While unoccupied it would be clearly exempt. When leased and improved by a tenant the taxes could be generally collected from the occupant. We may assume that the Legislature knew that corporations often possessed land not actually required for their immediate purposes, and framed these exemption clauses accordingly.

By granting leases to tenants for building purposes the area of assessable property would be widened, and the municipal revenue increased, first, by the rent, secondly, by the assessment. It may be said that the same end could be obtained by holding the land as exempt from taxes, and thereby a higher rent would be obtained from a tenant. But any increased rental would hardly ever equal the amount of annual assessment derivable from the land in its improved state on a yearly valuation.

On the whole, we think the plaintiff fails to establish his exemption, on the facts shewn in these pleadings.

It remains to consider the effect of his appeal to the Court of Revision, and his failure there.

The statute creating the Court of Revision (Consol. Stat. U. C. ch. 55, sec. 61), and providing for an appeal thereto, and its being heard, declares that "the roll as finally passed by the Court, and certified by the Clerk as so passed, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, except in so far as the same may be further amended on appeal to the Judge of the County Court."

And when the appeal comes before the Judge, sec. 68 says: "The decision and judgment of the Judge, or acting Judge, shall be final and conclusive in every case adjudicated upon."

Language more apparently indicating the establishment of a rule of decision to govern all cases, and bar all further question as to the liability to assessment, could, we think, not easily be used.

If every person dissatisfied with such decision can try the question over again by replevying his goods when seized for non-payment, the judgment certainly is no longer "final and conclusive," nor will the roll "bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll," as provided in sec. 61.

But there are several decisions on this subject. The first is, *The Great Western R. W. Co. v. Rouse* (15 U. C. R. 168). There it was held by this Court that the decision of the Judge was only final in regard to such matters as by the 26th and 28th sections of 16 Vic. ch. 182 (the act then in force) were to be submitted to him; that is, any alleged overcharge or undercharge, or the wrongful insertion or omission of any person's name; and that it did not affect the right of resisting a distress for assessment in respect of property not liable to assessment.

The next case is *McCarrall v. Watkins* (19 U. C. 248). It was Replevin. The plaintiff was assessed as owner, the house being vacant, and had omitted to appeal. The Court held it was incumbent on him to appeal, if he meant to insist that his name was wrongfully inserted on the roll, and "having omitted to do so he became liable to pay the amount for which he stood assessed on the roll."

If a man's name be inserted in the roll in respect of property not assessable by law, according to the first case he can succeed in replevin, although the decision of the County Judge be against him. In the latter case it would seem that he was bound to appeal if he objected to his name being improperly on the roll. The distinction relied on is, we presume, that the property in the one case was, and in the other was not assessable. But in either the name might be improperly inserted in the roll.

Between the two last cases was *The Municipality of London v. The Great Western R. W. Co.* (17 U. C. R. 264). There it is said by Burns, J.: "The distinction, where it is necessary to appeal, and where the claim may be resisted by an action of trespass or replevin, is this: if the power existed to make the assessment, then there is a

jurisdiction in those doing it, and in such case the remedy is by appeal only; but if the assessment be illegal, then there is no jurisdiction to do it, and in such case the person resisting is not compelled to resort to the remedy of appeal, but may resist the illegal exaction."

Shaw v. Shaw (21 U. C. R. 437) says: "If the property was exempt from taxation by statute, there was no necessity for going to the Court of Revision in order to have their decision on the point."

In *Shaw v. Shaw* (12 C. P. 458), the Court of Common Pleas held that as the property was exempt from taxation by statute, the assessment was a nullity, and that although no appeal was lodged to the Court of Revision, replevin could be maintained for the goods seized for taxes.

The last case is *The City of Toronto v. The Great Western R. W. Co.* (25 U. C. R. 270), which indirectly brought up the question. The dispute was whether the railway station buildings were assessable, the land on which they stood being already assessed. The County Court Judge confirmed the assessment, but left it to a higher Court to determine if the buildings could be assessed. This Court held the reservation inoperative, and that "supposing the learned Judge had simply confirmed the decision of the Court of Revision, we do not imagine it would be questioned that neither in this nor in any other form could his judgment be reviewed." This came before the Court in a special case, the city suing for the amount of assessment.

The case of *Marshall v. Pitman* (9 Bing. 595), was on the Statute of Elizabeth for rating for the poor. Tindal, C. J., held that under the act "the sounder distinction seems to be, that as an inhabitant possessing visible personal property, he is liable to be placed on the rate, although his rateable property turn out afterwards to amount to nothing;" and held that he must appeal to the Sessions.

Alderson, J.—"The existence of the jurisdiction is one thing, and the mode of exercising it another, and if the plaintiff be an inhabitant he is within the jurisdiction of the Justices." He refers to *Milward v. Caffin* (2 W. Bl. 1330),

and says: "The plaintiff, who had been rated as an occupier, was proved not to be such."

This statute required the overseers to raise by taxation of every inhabitant, &c., competent sums for the poor, to be gathered out of the same parish according to the ability of the same parish.

In *Charleton v. Alway* (11 A. & E. 999), Lord Denman says: "The only question is, whether the plaintiff ought to have appealed to the Commissioners. We think that he was not bound to do so. Being assessed in respect of that which was not subject to the land tax, he had as much right to treat the assessment as a nullity as if it had been in respect of property not in his occupation."

Our Assessment Act, sec. 8, directs the rates to be on the whole rateable property; and (sec. 19) the assessors are to set down in the roll "the names of all taxable persons resident in the municipality, who have taxable property therein."

In a case like that before us the plaintiff, for all that we see, is only on the roll in respect of the property in dispute.

Sec. 60 says: "Any person complaining of an error or omission in regard to himself, as having been wrongfully inserted in or omitted from the roll, or as having been undercharged or overcharged by the assessor in the roll" may appeal.

It is perhaps not easy to see how these words do not cover the whole ground—namely, the wrongful insertion of a name, and undercharge or overcharge. The man who has nothing but property not assessable is wrongfully on the roll. According to these decisions he need not appeal, or if he do is not bound by the judgment of the Court of Revision or County Judge.

We think, on the whole, we should follow the latest decision of this Court, as it accords with our individual views, and that there should be judgment for defendants on demurrer.

DRAPER, C. J., concurred.

MORRISON, J.—I regret that in this case I must differ from the judgment of the majority of the Court on the first point, and I do so with considerable hesitation.

The language of the seventh sub-section of section 9 is far from being clear, and is very difficult of a satisfactory interpretation. In my opinion it exempts all property belonging to a municipality from taxation. The concluding words, "whether occupied for the purpose thereof, or unoccupied," with whatever object they were inserted, do not, I think, restrict or qualify the exemption.

If it was in the contemplation of the Legislature that such property when occupied by tenants or other occupiers, should be liable to taxation as other property, it would have used express words to shew its intention, as it has clearly and consistently done in reference to property vested in Her Majesty, by the second sub-section of the same section; or by a similar restriction to that mentioned in the fourth sub-section as to property of universities, &c.

To make the property of the municipality when occupied liable to assessment as other lands, would, in my opinion, be inconsistent with and repugnant to the whole scope of the act. From the very reason of the thing, I think the Legislature could not have had in view the making of it ratable for the purposes of the municipality itself, or to render its property liable to municipal impositions, and to the various special and local rates to which private property may be liable, and upon non-payment of such taxes rendering it liable to a lien or to be sold for taxes; for if liable by being occupied to be assessed, it would be liable to all the incidents attending other ratable property.

Under the Assessment Act the amount of taxes required in any year is previously ascertained, and the amount is estimated in a city at so much in the dollar upon the yearly value of all property liable to be assessed therein. If the property in question, occupied by others, is to be included in the total valuation, which it must be if liable to taxation, should the tenant or occupier fail or be unable to pay the taxes, the amount would be lost to the city; while if such

property is entirely exempt, the amount required for taxation and the amount for estimation would in no wise be affected, and the property itself and the municipality would be freed from the obvious anomalies I have referred to by its being placed on the assessment roll.

I need hardly state that such property, by reason of its exemption, if rented by the municipality would necessarily render an increased rent.

It is for these reasons that I cannot suppose that the intention of the Legislature was to render municipal property in any wise a subject of taxation; and as the sub-section is obscure and ambiguous, I do not think we are warranted in putting upon its words what I think is a forced construction, so as to admit the consequences I have alluded to.

If it was intended to mean that all such property should be subject to taxation, except that occupied by the city for public purposes or unoccupied, I cannot see any use in the enactment, as it appears to me the same result would have been effected in the absence of the exemption, for it would be idle to suppose that the assessor would assess property used for city public purposes, or belonging to the city and unoccupied, and that the collector should demand and receive from the chamberlain taxes for the purpose of paying it back to that officer.

On the whole, I am of opinion our judgment should be for the plaintiff.

Judgment for defendants.

FOSTER ET AL. V. GLASS (Sheriff).

False Return—Prior writ not acted on—Sheriff estopped from setting it up.

In an action against the Sheriff for a false return, it appeared that on the day before the plaintiffs' writ came in he received a *Fi. Fa.* at the suit of one K. for more than the value of the debtor's goods, and gave a warrant to his bailiff, who only went to the debtor's shop and told him of it, because he thought more could be got by allowing him to go on with his business. On the plaintiffs' writ he did nothing. The plaintiffs' attorney wrote twice, urging him to act, and ruled him, and in February, 1866, he returned that writ *nulla bona*, K.'s writ having been previously renewed. The Court being left to draw inferences of fact—

Held, that, as a matter of fact, the Sheriff never seized, or that, as a matter of law, he abandoned it; and that though his acts might not affect K. in an action between K. and the plaintiffs, yet they prevented him from setting up the first writ as a justification for his return to the second. The plaintiffs were therefore held entitled to recover.

ACTION against the defendant as Sheriff for a false return of *nulla bona* to a writ of *fi. fa.* against the goods of one David Marrs, at the suit of the plaintiffs, endorsed to levy \$477 20 damages, and \$67 52 costs, with costs of writ, &c.

The writ was delivered to the Sheriff, and it was averred that he made a levy. In the second count the charge was that there were goods upon which he might have levied, but did not.

Pleas. To the first count, that he did not levy. To the whole declaration, not guilty; and that after the delivery of the writ to him there were no goods of the said David Marrs in defendant's county whereof he could levy the moneys.

Issue.

The case was tried at Hamilton, in November, 1866, before Richards, C. J.

The writ of *fi. fa.* in the plaintiffs' suit was tested 18th September, 1865, and was delivered on the following day to the Sheriff. There was evidence that Marrs, the execution debtor, had goods in the defendant's county. It was returned on the 1st of February, 1866, *nulla bona*. A question was raised as to the clerk in the Sheriff's office who made the return, but the learned Chief Justice held there was evidence to go to the jury.

On the defence a writ of *fi. fa.* in favor of one Jane King

against the goods of Marrs, endorsed to levy \$630 41 damages, and \$19 19, with interest, &c., was put in. It was tested 18th September, 1865, and was received by the defendant on the same day, and was renewed for one year from the 15th September, 1866. On this writ a warrant was issued to a bailiff, who had made no return.

The bailiff who had this warrant swore that he went with it to Marrs' shop and told Marrs he had an execution against him: that he looked at the stock and satisfied himself he could not make more than \$150; when the plaintiffs' writ was returned there was not sufficient property to satisfy the first execution; the reason of his not seizing or doing more was that he thought by waiting he would be able to make more. He would not swear he made any formal seizure, or told Marrs to consider his goods seized. He did the same under the second writ as under the first. Marrs carried on his business just as before. The stock in Marrs' shop was kept up. He never got any money on King's writ, but her attorney told him money had been paid in that suit, and he (the bailiff) took no steps to enforce the execution, except going to Marrs and enquiring about his paying. It appeared however that there was a small sum credited to the defendant Marrs in the Sheriff's books, and it was to be gathered from the evidence that Marrs paid it to the Sheriff because of the execution or executions in the office.

In reply the plaintiff called Marrs, the execution debtor, and he swore that King's suit was first begun: that he did not defend it, but he employed her attorney to defend the plaintiff's suit, though he had no real defence to it: that both her claim and the plaintiff's claim were just. He could not state that the bailiff made any seizure under her execution.

Two letters addressed by the plaintiffs' attorneys to the Sheriff were put in, one dated 7th December, 1865, notifying the Sheriff that they disputed the validity of the judgment of King against Marrs, and required him to proceed to a sale of Marrs' goods, and to pay over the proceeds to them; the other dated 11th January, 1866, as follows: "Foster v. Marrs:

You will please advise us what you have done or intend doing. We would like a return to our writ." No answer was given to either letter. On the 25th of January the Sheriff was ruled to return the plaintiffs' writ. The plaintiffs also put in an exemplification of their judgment against Marrs.

The learned Chief Justice asked the jury to say if King's execution was placed in the Sheriff's hands to be executed, or merely to cover the property of Marrs under it. He told them, if they thought King's writ was placed in the Sheriff's hands to be executed, to say so, but to find for the plaintiffs, and to assess the damages, and he would reserve leave to the defendant to move to enter a nonsuit or a verdict for defendant.

The whole question as to the effect of what was done was to be referred to the Court, who were to be at liberty to draw inferences of fact; the real question referred, and not found by the jury, being whether the acts by the Sheriff and his bailiff in the execution of these writs were such as to give the plaintiffs' writ priority over that of Mrs. King. If the Court thought the plaintiffs entitled to recover, the verdict to stand; if not, a nonsuit or verdict for defendant to be entered.

The jury estimated the damages at \$175, for which sum a verdict was entered for the plaintiffs.

In Michaelmas term, *M. C. Cameron*, Q. C., obtained a rule *nisi* upon the leave reserved. He cited *Clark v. Morrell*, 21 U. C. R. 596.

In this term, *C. Robinson*, Q. C., shewed cause, citing *Castle v. Ruttan*, 4 C. P. 252; *Neilson v. Jarvis*, 13 C. P. 176; *McKee v. Woodruff*, *Ib.* 583; *Kerr v. Kinsey*, 15 C. P. 531; *Towne v. Crowder*, 2 C. & P. 355.

DRAPER, C. J., delivered the judgment of the Court.

We are of opinion this rule should be discharged. The case depends on what the acts of the Sheriff and his bailiff were upon King's writ, and what was the legal consequence of those acts in regard to the rights of the present plaintiffs.

Marrs had goods liable to seizure and sale under either or both writs; their value is determined by the jury. The Sheriff received King's writ first, and made a warrant to his bailiff, who went to Marrs' house, told him he had an execution against him, looked at the goods, and went away because he thought that if Marrs were left in possession to carry on his business, more would be realized out of him than by proceeding upon the execution.

On the following day the plaintiffs' writ came to the Sheriff's hands, and upon this it does not appear that he did anything. King's writ was taken from the Sheriff, and was renewed, and continued by such renewal in force when the plaintiffs' writ was returned *nulla bona*, after two letters had been written by the plaintiffs' attorney to the defendant to urge him to act, and after the Sheriff had been ruled. From the 18th April, 1865, to the latter part of January, 1866, about which time this return was made, Marrs continued in possession, carrying on his business and disposing of his goods.

As a matter of fact, we conclude from the evidence that the Sheriff never made a seizure upon either writ, and as a matter of law we think that if his acts could be held to amount to a seizure, that he abandoned it. The case appears to us even stronger against the defendant than *Blades v. Arundale* (1 M. & S. 711), where there was a seizure, and the bailiff locked up his warrant in the drawer of a table which he had seized, took away the key, and left the premises. The fact that the execution in favor of Mrs. King was renewed for a year after the Sheriff had received the plaintiffs' writ, confirms our conclusion that up to that time there was no seizure, for if execution had been commenced it could have been completed after the first writ was returnable. The renewal was only to maintain the assumed priority of King's execution, which was thus kept alive with the obvious idea that it would prevent any proceeding upon the plaintiffs' writ.

In *Towne v. Crowder* (2 C. & P. 355), *Best*, C. J., held, in an action like the present, that it was no defence for the

sheriff to shew a prior execution, if the Sheriff had also returned to that *nulla bona*.

That return of course concluded the Sheriff from setting up the prior writ, and it has not, nor has any other return been made to King's writ. But the Sheriff has not acted upon it, and he shews no instructions from the plaintiff in that writ to refrain. If it were done at the instance of Mrs. King, the present verdict is certainly right; if it be the Sheriff's own voluntary act, its effect is as wrongful towards the plaintiffs. As his own act it may not affect Mrs. King in any question between her and the present plaintiffs, but it may and we think ought to prevent the Sheriff from setting up the first writ as justifying returning to the second *nulla bona*, when Marrs certainly had some goods. It is well put by Macaulay, C. J., in *Castle v. Ruttan* (4 C. P. 252): "I do not see that it is in the discretion of the Sheriff, any more than of the plaintiff, to do what if done by the plaintiff's direction would displace his writ. The Sheriff in the absence of directions acts upon his own responsibility; and if he adopts a course which conflicts with the rights of others, he may incur responsibility to the first execution creditor or to the second; but he has no discretion to bond the goods to the debtor, or to suffer him to continue the possession or use of the goods, and to prosecute his business with them as before, suspending and deferring the execution indefinitely, and until long after its return, without further acting upon it, and at the same time to interpose the expired writ between the writ of another creditor and the goods. It seems to me the effect of the Sheriff's conduct is the same as respects third persons, or other creditors, whether it is directed by the plaintiff in the first writ, or spontaneous on the part of the Sheriff."

In that case it is true the first writ had expired. Here it was not acted upon, and after some months was renewed, and remains in the Sheriff's hands still, never having been put in force. The goods during all the time until the plaintiffs' writ was returned remained the goods of Marrs, or he sold them in the course of his business. Under all these

circumstances we think the writ first received cannot be used by the Sheriff to absorb the goods, and justify his return of *nulla bona*.

Rule discharged.

NICHOLAS ACRE, v. SAMUEL LIVINGSTONE, JOHN B. WALLACE, ALEXANDER ACRE, AND MARGARET MEARS.

Deed—Release—Construction—14 & 15 Vic. ch. 7, sec. 2.

A. died in possession intestate in July, 1851, leaving his widow, and the plaintiff his eldest son. The plaintiff, on the 15th October, 1851, by deed poll, in consideration of £50, "remised, released, and for ever quit claimed" the land, in fee simple, to his mother, who was still living on the place. Defendants claimed under her.

Held, that the deed could take effect as a release only; that the widow, being a tenant at sufferance, had no estate upon which it could operate; and that it therefore passed nothing.

Held, also, that the 14 & 15 Vic. ch. 7, sec. 2, enacting that all corporeal tenements and hereditaments shall be deemed to lie in grant as well as in livery, could not help; for it was not intended to alter the construction of the language of deeds, but to enable terms which would only have passed incorporeal to pass corporeal hereditaments.

Hagarty, J., dissenting, on the ground that whatever words would amount to a grant of an incorporeal hereditament before the statute, would by virtue of it operate on corporeal hereditaments; and *quere*, whether the estate of the widow was not sufficient for the deed to take effect as a release.

EJECTMENT for the North half of lot 1 in the 9th concession of Bayham. The three first-named defendants appeared for three separate portions of the lot, making together the one hundred acres of which it consisted. Margaret Mears did not appear.

The case was tried at St. Thomas, in October last, before Hagarty, J.

Jacob Acre acquired this land by purchase and conveyance, dated 31st May, 1844, and died in possession in July or August, 1851, leaving the plaintiff, his eldest son, and Margaret, now Margaret Mears, his widow, with several younger children, him surviving. Plaintiff was out of the province when his father died. The mother, Margaret, with

the rest of the family, were still residing in the house. On the 15th October, 1851, the plaintiff having come home, executed a deed poll, by which, in consideration of fifty pounds, the receipt whereof he acknowledged, he "remised, released, and for ever quit claimed" to his mother, Margaret Acre, this land, to have and to hold to her in fee.

The other defendants claimed through this deed, Livingstone and Wallace having paid a large consideration. Livingstone had bought fifty acres, by conveyance, dated 10th June, 1865, and Wallace, who bought from Alexander Acre, by deed dated 25th June, 1866, fifty acres more, which the widow Margaret had by deed dated 1st February, 1858, conveyed to him.

Margaret Mears gave evidence that the £50 mentioned in the plaintiff's deed to her was never paid: that when the plaintiff returned after his father's death she told him that this property was left to her, that there was a will, and that he was to give a release to her; plaintiff did not ask to see the will, but executed the deed poll shortly afterwards, and, as the subscribing witness swore, fully understanding what he was doing. The same week after executing the deed the plaintiff became aware there was no will, and he said his mother had cheated him. There was contradictory evidence as to the payment of the consideration of £50. It was, if paid, paid by cattle or horses, not by money.

The only question left to the jury was the validity of this deed from the plaintiff as a matter of fact. The learned Judge directed, as a matter of law, that it was sufficient to pass the fee. The jury found for defendants.

In Michaelmas Term, *D. B. Read*, Q. C., obtained a rule calling on the defendants to shew cause why there should not be a new trial, on the ground of misdirection as to the legal effect of this deed.

M. C. Cameron, Q. C., shewed cause, citing *Nicholson v. Dillabough*, 21 U. C. R. 591; *Cameron v. Gunn*, 25 U. C. R. 77; *Shep. Touch.* vol. ii. p. 325; *Consol. Stat. U. C.* ch. 90, sec. 2.

Read, Q. C., contra, cited Com. Dig. Release C. 2, D. 3; *Doe McKenny v. Johnson*, 4 U. C. R. 508; *Doe Connor v. Connor*, 6 U. C. R. 298; *Rose v. Simmerman*, 3 Grant, 598; *Crabb* R. P. Vol. II., 93, 97; *Co. Lit.* 34 b; *Dav. Con. Prec.* 53; *Brown v. Meredith*, 2 Keen 527.

DRAPER, C. J.—If a man have a possession only, and no estate, as if he be a trespasser, or if he have occupation only as tenant at sufferance, as where a tenant doth hold over his term or the like, no release to him can work any enlargement of estate; for albeit he have a possession yet he hath no estate for the release to work upon. *Shep. Touch.* 325.

In *Doe McKenny v. Johnson* (4 U. C. R. 508), the Chief Justice, speaking of a widow, says, "She is not a disseizor, for her possession commenced rightfully; and she is to be looked upon as a tenant at sufferance, entitled, as we may assume, to remain on the estate on which her husband died, as his widow, for a limited period under her right of quarantine, but staying without right beyond that period, her dower being, for all that appears, not yet assigned to her."

This language describes accurately the position of the mother of the plaintiff at the time the deed poll of the 15th October, 1851, was executed.

It seems to me this release had nothing to operate upon, and was void. In the case of *Cameron v. Gunn* (25 U. C. R. 77), the defendant by deed, in consideration of 5s., remised, released, and for ever quitted claim to the plaintiff, his heirs and assigns for ever. We held that for want of apt words to pass the estate except by way of release, the deed was ineffectual and void, distinguishing the case from *Nicholson v. Dillabough* (21 U. C. R. 594.)

The case of *Shove v. Pincke* (5 T. R. 124), was also noticed, in which Lord Kenyon, in speaking of a deed professedly executed under a power of appointment, and in which the only operative words were "*limit and appoint*," says "I do not see why this should not operate as a grant of the reversion. It has never been held necessary that the

word 'grant' should be used in a grant, it being sufficient if the intention to grant be manifest in a deed."—language very pertinent to his first observation, as applied to a case where, if there had been no difficulty in the score of the power, the words "limit and appoint" were sufficient. He was speaking of a reversion of which a party cannot be properly said to have seizin, which in strictness means possession, for it is an expectant estate and the proper subject of a grant. Buller, J., in the same case says, "The thing conveyed is a reversion; that is, the subject of a grant; and the words 'limit and appoint' operate as a grant." This case is surely no authority that "remise, release and for ever quit claim," are words which operate as a grant.

There is an earlier case, *Goodtitle v. Bailey* (Cowp. 600), in which they are dicta to the same effect, though the decision was rested on a different ground. Lord Mansfield, speaking of the rules for the construction of the deeds, observes, "They shall operate according to the intention of the parties, *if by law they may*; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention. But an objection is made in this case, which, it is said, takes it out of the general rule and the doctrine of the authorities cited; and that is, that in the release in question the word *grant* is not made use of. But that the intention of the parties was to pass all the right and title of the plaintiff in these premises, is manifest beyond a doubt." His Lordship then adverted to a totally different point, which he says is decisive. And Aston, J., adds, "This is the common wording of a release; but though in the shape of a release, *if there are sufficient words*, it may operate as a grant. *The last ground however is decisive.*" In that case there were covenants that the defendants should enjoy, and for further assurance.

I have never seen this case referred to as an authority that the words "remise, release, and for ever quit claim" are sufficient to pass the fee by their own intrinsic force. Even the reporter's marginal note does not treat it as decided upon that ground, and apposite as it would have

been if it was an authority to that effect, it was not referred to in *Shove v. Pincke*, decided by Lord Kenyon, who succeeded Lord Mansfield.

A still earlier case, *Roe dem. v. Wilkinson v. Tranmer* (2 Wils. 75), is also an authority that a deed void as a release may operate in another way, *i. e.* as a covenant to stand seized to uses. The reasons given by Willes, C. J., why it should have that effect are put together at p. 78, and among them is "Secondly, there are apt words; the word *grant*" (which was used) "alone would have been sufficient."

It can hardly be necessary to distinguish these cases from the present. It is much more difficult to distinguish this case from *Cameron v. Gunn*, which we so recently decided. The sole difference is that the present deed purports to be founded on a valuable consideration. I have met with no case which upon that sole ground alters the long settled effect of the words remise, release, and quit claim.

It has not been nor could it be contended that this release could operate either to pass the estate by *mitter*, for the releasor and releasee did not stand in the necessary mutual relation for this purpose; the necessary privity was wanting. Nor could it take effect by *mitter le droit*, for the releasor was not disseized by the releasee, for she did not enter possession wrongfully. It can only be by way of enlargement, to which it appears to me to be a conclusive answer, that there was no privity of estate between the parties, and that the releasee had no estate actually vested in her which was capable of enlargement.

Reverting to the consideration expressed in this deed, I view the evidence of its payment as very unsatisfactory, and if that alone would turn this into a deed operating as a grant, I should desire to have this question of fact determined by a jury.

I have noticed and reflected upon what Mr. Preston has written on this. I have not the presumption to enter upon a criticism of his views upon a question affecting the law of real property, but when I find him controverting the law as stated in Coke, and when I have not found one reported

case since Coke wrote which supports Mr. Preston's conclusion, I venture to rely on the more ancient authority as the safer guide. I do not assert that Coke is an infallible authority, nor is this the solitary instance in which Mr. Preston has expressed his dissent from the deliberate and profoundly considered judgment of others as highly placed and perhaps as worthy of respect as Coke himself. I cannot at this moment refer to the authority from which I have gathered the impression that Mr. Preston as entirely differed from Lord Mansfield on an intricate question of the law of real property, as he seems to have done from Lord Coke (*a*).

It is, however, necessary to advert to the Consolidated Statutes of Upper Canada, ch. 90, section 2, which enacts that as regards the conveyance of the immediate freehold thereof, all corporeal tenements and hereditaments shall be deemed to lie in grant as well as in livery. I do not understand this enactment to have been made in order to regulate or change the construction of the language of deeds, nor otherwise to affect their operation than by giving to those terms which would only be effectual to pass incorporeal hereditaments—in other words, to those which contain sufficient words to constitute a grant—the effect of passing corporeal hereditaments therein mentioned and described. But the law as to the construction of the language used in deeds, does not, so far as I can see, come within the provision of the act. If the words of conveyance used are such as long settled construction has pointed out as operating only by way of enlargement, and the conveyance cannot, either for want of privity or of an estate to be enlarged, or for any other reason, take effect in that way, the statute will not help. If the words of this deed are sufficient to operate as a grant, these lands have passed by it, for the statute came into force a little more than two months before the date thereof.

(*a*) See Taylor ex dem. Atkyns v. Horde, 1 Burr. 60; Doe v. Lynes 3 B. & C. 388, 395.

I have hitherto found no case which decides that the words "remise, release, and for ever quit claim," where there are no covenants of any kind, and where it is open to question whether there was any valuable consideration, are sufficient to pass the estate by way of grant, since the statute any more than before it.

The only consideration that has pressed me is the interest of subsequent purchasers. But they appear, so far as I can see, to have taken no precautions to examine into the title, or to take proper advice as to its sufficiency. They have, as is the common course, most probably purchased without enquiry, or at all events without going beyond the Registry office. With the utmost respect for that venerable maxim, *Benigne faciendæ sunt interpretationes propter simplicitatem*, or, as it is frequently given, *ignorantiam laicorum*, it may be remembered that the laics of our times are not so uneducated as in the days when that maxim was young, and that few purchasers of land are ignorant of the consequences of buying a defective title, or of the most probable mode of finding whether they can safely purchase. There are more who from an unwise economy incur the risk of loss of their purchase money. But such parties have no claim on the Courts to strain or innovate upon the law for their protection.

HAGARTY, J.—We are called upon, for the first time, as far as I can learn, to decide the meaning of the Statute of 1851, 14 & 15 Vic., ch. 7, section 2, which became law a few weeks or days before this conveyance was made. "All corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant, as well as in livery."

The instrument before us contains apt words of inheritance in its *habendum* to the grantee, "her heirs and assigns for ever;" the operative words are "remise, release, and for ever quit claim unto her, the said M. A., her heirs and assigns for ever."

I see no other mode in which full effect can be given to the statute, than to hold that whatever words would amount

to a grant of an incorporeal hereditament, or of anything lying in grant *before* the statute, must equally operate *since* the statute on corporeal hereditaments, and to the same extent, if proper words of inheritance be used.

Would the words here used amount to words of grant before the statute?

"But it should seem (*cæteris paribus*) that an instrument in the form of a release may operate as a grant."—2 *Shep. Touch.* 325. "If a man make a lease for twenty years, and the lessee make a lease for ten years, and the first lessee doth release to the second lessee (*viz.*, the underlessee) and his heirs, this release is void. In each of these cases the deed may operate as a grant, and must be pleaded accordingly."—*Ib.* 326.

"A release is the conveyance of a man's interest or right, which he hath unto a thing, to another that hath the possession thereof or some estate therein."—*Ib.* 320

"*Dedi et concessi* be the most apt words for all kinds of grants; yet it may be by other words, and the grant as good as by those words; and the words limit and appoint may amount to a grant" (quoting 5 T. R. 124, 310) "No formal words are necessary." *Ib.* 232.

Co. Lit. 301 b. "*Dedi* or *concessi* may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c., and it is in the election of the party to use which of these purposes he will. * * But a release, confirmation, or surrender, &c., cannot amount to a grant, &c., nor a surrender to a confirmation, or to a release, &c., because these be proper and peculiar manner of conveyances, and are destined to a special end."

Shep. Touch. 324, "At this day, beyond all doubt, an instrument in the form of a release may operate as a surrender."

Preston on Conveyancing, Vol. II, p. 359, "Whenever any difficulty arises in giving effect to an instrument as a release, for want of privity of estate, or for want of any prior estate, it will be proper to consider whether the instrument intended as a release may not operate in some other

mode, viz., as a surrender, appointment, grant, or covenant to stand seized, a confirmation, or a release of right. Whenever circumstances will admit of its operating in either of these modes, the decisions of modern times, indeed the general rules of construction and the principles of law, justify the expectation that the operation of the instrument may be supported in either of those modes, whichever will give effect to the general or immediate object of the parties, to change the title from the intended releasor to the intended releasee”

In *Burton* on Real Property, section 43, speaking of transfers of remainders and reversions, it is said, “Nothing more seems requisite, in point of verbal accuracy, to the validity of such a grant, than that the deed clearly express the intention of the grantor to convey; though the word ‘grant’ is certainly the most regular indication of such intention,” citing Cowp. 600, 5 T. R. 129, 310. Again, (Sec. 53) “If C. had given land to B. for his life, and B. had afterwards made a lease to A. for twenty-one years, and C. release to A., the release would have been void for want of what is called privity of estate between the parties, which exists only where both estates were acquired by the same conveyance, or the one derived immediately out of the other. It would seem, however, that in this case the deed, though purporting to be a release, might be supported as a grant; and if so it appears nugatory to say that it is void as a release, unless there be some difference of operation between a release and a grant. The distinction commonly made is, that a grant conveys the reversion or remainder; but a release *enlarges* the particular estate.”

In *Goodtitle dem. Edwards v. Bailey* (Cowp. 597), the deed had only the words “renounce, remise, release, and for ever quit claim,” with covenants for further assurance. The extract from Coke already cited was quoted against the deed. Lord Mansfield said, “Deeds shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention. * * In the

release in question the word 'grant' is not made use of. But that the intention of the parties was to pass all the right and title of the plaintiff in these premises, is manifest beyond a doubt. One thing, however, is decisive. This is a *fictitious* action" (ejectment) "to recover the possession. In such an action, if a man has made a solemn deed covenanting that another shall enjoy the premises, and likewise for further assurance, it shall never lie in his mouth to dispute the title of the party to whom he has so undertaken." Aston, J., said, "This is the common wording of a release; but though in the shape of a release, if there are sufficient words, it may operate as a grant."

I cannot find anything in the statement of the deed to warrant the assertion that there was a covenant that the defendant should enjoy, as stated by Lord Mansfield.

In the oft-quoted case of *Shove v. Pincke* (5 T. R. 129, 310), Lord *Kenyon* says, "It has never been held necessary that the word 'grant' should be used in a grant, it being sufficient if the intention to grant be manifest by a deed." Buller, J. "The thing conveyed is a reversion; that is the subject of a grant; and the words 'limit and appoint' operate as a grant."

In that case the grantor, after revoking certain uses, limited and appointed the premises to A. B. in fee, and as to certain other premises limited and appointed to herself for life, remainder to defendant Pincke in fee.

In *Roe Wilkinson v. Tranmer* (Willes, 684), *Willes*, C. J., citing from *Sheppard on Common Assurances*, that a deed intended for a release, if it cannot operate as such may amount to a grant of a reversion, an attornment, or a surrender, and so *è converso*, adds, "and the Judges in these times (and I think very rightly) have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it."

At the date of all these authorities, an estate in fee simple in possession could not pass by way of grant, while a reversion

or remainder could so pass. The Statute, as I have already said, appears to make *all* estates in possession or reversion to lie in grant, and necessarily therefore, in my judgment, to be capable of immediate transfer by deed of grant. I feel therefore forced to what I regard as the inevitable result—that whatever words of conveyance would under the former law amount to a grant of a reversion, must now equally amount to a grant of all that lies in grant or is capable of passing by way of grant.

We have before us a deed, a valuable consideration, a declaration that the owner of the fee simple releases and for ever quits claim to another person, her heirs and assigns for ever, the land in question.

Would the deed be any stronger to pass the fee if it contained a covenant for further assurance, or for quiet enjoyment, as in the case before Lord Mansfield?

The covenants may in some cases much assist to shew the meaning of the parties, but I hardly see how in a court of law they assist to pass the estate, if the deed be defective in operative words of conveyance, unless perhaps where the deed may be held to operate as a covenant to stand seized.

The intention of the owner in this case is plain beyond contention, I think, to give the land to his mother and her heirs for ever. Our duty is certainly to be “astute” to endeavour to uphold rather than to defeat it, and I think the rules of law enable us to take the former course.

I have arrived at this conclusion regarding the deed as passing an estate in possession, not as enlarging any existing interest by release of the reversion. The text writers, with the illustrious exception of Mr. Preston, seem to agree that a person in possession of an estate, as the widow was here, cannot take a release: that she is not in privity with the releasor, and has no estate to enlarge; that at best she is tenant at sufferance.

On her husband's death she remained with her younger children quietly in possession. She could maintain trespass against a wrong-doer, and if left twenty years undisturbed, would obtain a Parliamentary title. Untrammelled by

authority, we should, I think, feel little difficulty in holding that she was in a position to have her interest enlarged by a release.

A disseisor can take a release, so can a tenant at will. It may without presumption be termed a subtlety, however respectable by long descent and universal acquiescence, that the widow here in possession should be in a worse position than either of the others. She is either tortiously keeping the true owner out of possession, or she is holding with his assent.

Mr. Preston, in his work on conveyancing, Vol. II, p. 302, uses this remarkable language: "The case put by Littleton in sec. 461, is the general authority that a *mere trespasser*, or a mere occupier, though he may claim to hold at will, has no estate; and that without an estate creating the relative situation of tenant, or *quasi* tenant, and lord or reversioner, there cannot be an effectual release by way of enlargement. At the same time that this section is urged, and its principle acknowledged, it is, as already noticed, rather a subject of surprise that the law had not accepted the conduct of the parties as evidence that the occupier *consented to be tenant at will*; and that the owner of the inheritance agreed to this tenancy, *considering the release as the evidence and acknowledgment of the tenancy, and as the only means by which the release could be effectual by way of conveyance*; and in modern practice no reasonable doubt can be entertained that under such circumstances the law would consider the occupier, or the occupier by sufferance, as tenant at will. This indeed is the law, as may be collected from Lord Coke in his commentaries on Littleton, sec. 461, though that part of his Commentary which applies the text to a tenant at sufferance seems to be mistaken."

After pointing out his grounds for this, he proceeds to notice the case of *Rees dem. Chamberlain v. Lloyd* (Wightwick 123), in which, on a freehold lease, without livery, it was held that the words "now in the occupation and tenure

of Chamberlain," (the lessee) "and his undertenants," estopped the lessor from denying such possession.

Mr. Preston proceeds (P. 313), "Nor would it be right to dismiss this section of Littleton, which has called forth these observations, without remarking that the rightful owner might have treated the person thus claiming to occupy at will as a trespasser or as a disseisor at election, for every person who enters wrongfully is necessarily a trespasser, and the freeholder may at his election treat the trespasser as a disseisor, and as the trespasser cannot qualify his own wrong, every disseisin, (except, perhaps, as already stated, the particular and special case of a disseisin of the tenant of a particular estate, under a claim of his estate only) is necessarily a disseisin of the fee simple, and the disseisor is capable of a release from the disseisee in extinguishment of the right. * * * The context of Littleton sufficiently demonstrates, that in the section which has given rise to these observations the author was treating of the possession of a wrongdoer, and *not of a tenant by sufferance.*"

As I have already arrived at the conclusion that effect can be given to this deed as passing an estate in fee simple, and not merely by enlargement, it is not necessary for me to decide finally on its possible operation in the latter sense.

If it were so, I should pause long before holding the deed valueless as a mere release, profoundly impressed as I am by the sound sense and logical criticism of that great master of real property law, Mr. Preston.

No English Court has, as far as I can learn, decided against the rational view of this writer. The opposite doctrine rests on the early dicta of the great text writers, each following the other.

I should have hoped that, had the occasion arisen, he would have been a true prophet when he asserted that "in modern practice no reasonable doubt can be entertained, that under such circumstances the law would consider the occupier, or the occupier by sufferance, as tenant at will," and therefore capable of taking a release of the reversion.

MORRISON, J., I fully concur in the judgment of the learned Chief Justice. I can find no decision or even dicta, with the exception of the observations of Mr. Preston, referred to by my brother Hagarty, which would warrant us in considering whether the instrument in question is other than a naked release. I can only reconcile the remarks of that very able and learned writer with other parts of the text of his work, on the ground that he was assuming that the instruments of release he refers to might contain recitals or other words on their face besides the operating words of a release, as they almost invariably do in England, which would authorize a Court in giving to them a more liberal construction.

Mr. Preston, at page 302, Vol. II, of his same work, says, "All the books agree that when there is a *mere possession*, without any estate, a release cannot operate with effect. A person holding by sufferance" (which is the case here), "or a mere trespasser, has a mere naked possession, and no estate." And at page 358 he further says, "For the sake of illustration of the general principles which govern this doctrine," (want of privity of estate), "it may be observed that the possession which a person formerly tenant for years has by *sufferance*, and who is, without much attention to technical accuracy, denominated a *tenant* by sufferance, cannot be enlarged by a release. The reason is obvious; he has a mere naked possession; and no estate; no privity."

And again, at page 284, "But a tenant *at sufferance* has no estate, nor is there any privity remaining; and as a consequence, he is not capable of a release to operate in enlargement of an estate. In short, a person who merely has the possession, or holds by sufferance, is inaccurately denominated a tenant. *Tenants* in dower and by curtesy, being those husbands and wives who have actual estates, are capable of such release. They have a notoriety of possession, and privity of estate with the releasor. Each of these tenants has an estate of freehold. It is at the same time observable, that before the title of dower is perfected by execution or endowment, the dowress has not any estate;

she has merely a title of dower. That title may, by way of extinguishment, be released by the dowress ; but while she has any interest short of an estate, she is not, in respect of such interest, capable of a release."

I quote this latter passage as indicating the law as well as its application to the case before us.

If on the face of this deed there were words evincing an intention that the instrument should enure other than as a naked release, or if we found in it language which might be construed to give it a different operation, such as a covenant for further assurance, the words limit and appoint, alien, and many other words that might be suggested, it would come within the principles acted upon in *Shove v. Pincke* and other cases ; but in the reports of these cases I find nothing from which we might infer that an instrument such as the one now in question would have been held to pass the estate to the releasee in this case.

I agree with the learned Chief Justice, in holding that the Act of 1851 does not give to this release any other operation than it had before the passing of that statute ; and it appears to me that if we were to decide that this instrument operated as a grant, and passed the estate, there would be an end to all distinction between a release and a grant.

I am not prepared to go so far in the absence of authority, and especially with the recent decision of *Cameron v. Gunn* before me.

I am of opinion the rule should be made absolute.

Rule absolute,

REGINA V. CLEMENT.

Inciting to make false affidavit—Venue.

Attempting to bargain with or procure a woman falsely to make the affidavit provided for by C. S. U. C., Ch. 77, Sec. 6, that A. is the father of her illegitimate child, is an indictable offence.

The attempt proved consisted of a letter written by defendant, dated at Bradford, in the County of Simcoe, purporting but not *proved* to bear the Bradford post mark, and addressed to the woman at Toronto, where she received it. *Held*, that the case could be tried in York.

Semble, per *Draper*, C. J., if the post mark had been proved, and the letter thus shewn to have passed out of defendant's hands in Simcoe, intended for the woman, the offence would have been complete in that County, and the indictment only triable there.

Per Hagarty, J., the defendant in that case would still have caused the letter to be received in York, and might be tried there.

Quære, whether, if F. C. had committed the offence, it should have been charged as a misdemeanour only, or as the statutory offence of perjury.

THE indictment contained two counts. The first stated that one F. C. was pregnant with an illegitimate child, of which the defendant was father, and that the defendant, while F. C. was so pregnant, did "corruptly attempt to bargain with the said F. C.," to corruptly make an affidavit in writing before a Justice of the Peace having authority, &c., that one R. W. was really the father of the child of which she was pregnant; and that the defendant unlawfully, &c., did thereby attempt to cause and procure the said F. C. to commit wilful and corrupt perjury.

Second count—That the defendant did unlawfully attempt to cause and procure one F. C. to unlawfully, wilfully, falsely, &c., &c., make an affidavit in writing before a Justice of the Peace having authority, &c., that one R. W. was really the father of an illegitimate child of which the said F. C. was then pregnant, when in truth and in fact the said R. W. was not the father of the said child; and that defendant did thereby unlawfully, &c., attempt to cause and procure F. C. to commit perjury.

The defendant was convicted at the Winter Assizes for the County of York, before Morrison, J.

The evidence of the girl, Frances Clarke, was positive that defendant seduced her and was the father of an illegitimate child to which she had given birth. She proved several letters which she had received from defendant; some written

before, some after the birth of the child. One of these letters, after alluding to the girl's pregnancy and denying that it was by himself, and referring to a conversation about seduction by Walker, proceeds, "Suspicion rests on Walker, but not on me. I make you an offer, and you must consider it well, and tell me in your next what you think. It is this: Go before a magistrate, if you have not done so already, and swear it to Walker, and leave the case in the hands of a lawyer to manage for you, and you will compel him to support the child as well as pay you something. I will for my part, if you do so, give you forty dollars, and my name not to be mentioned in any way. Think well of this, and try to help me while I lend you aid, for it is but due we should help one another."

This letter was dated "Bradford, Dec. 11th, 1865." It was received by the witness in Toronto, in an envelope which had upon it a post mark purporting to be that of "Bradford."

She denied any improper intercourse with Robert Walker, named in the indictment, or with any one but the defendant. She did not make any such affidavit as this letter suggested.

R. Walker was called for the defence, and swore he had connexion with Frances Clark "a year ago last April," (which would be in April, 1865, as the trial took place in January, 1867) and several times afterwards—some time in the Fall of 1866. The child was born on the 29th January, 1866. Other witnesses testified to want of chastity.

The learned Judge told the jury that before they convicted they should be satisfied that the defendant, knowing that he was the father of the child, corruptly attempted to induce Frances Clarke to swear that the child was Walker's; and that if they believed Walker, his testimony gave rise to such doubts that they ought to acquit the defendant.

Robert A. Harrison obtained a rule calling upon the Attorney-General to shew cause why there should not be a new trial, on the ground that there was misdirection in

ruling that upon the face of the indictment any offence in law was charged, and in ruling that there was evidence to sustain the offence charged. The rule also objected to the charge that the offence was sufficiently "shewn to have been committed in the County of York, and was at all events triable in the County of York."

J. H. Cameron, Q. C., *Doyle* with him, shewed cause. The indictment is sufficient in form—Consol. Stat. U. C. ch. 99, sec. 40. As to *venue*, the defendant might have been tried either in Simcoe or York, as in the case of an indictment for sending a threatening letter—*Rex. v. Burdett*, 4 B. & Al. 95; *Rex. v. Goodwood*, 1 Leach, C. C. 142; *Rex. v. Taylor*, 3 B. & P. 596; *Rex. v. Watson*, 1 Camp. 215.

As to the other objection, an attempt to suborn a person to commit perjury is a misdemeanor—Russ. C. & M. 4th Ed. Vol. I. p. 85. Con. Stat. U. C. ch. 77, sec. 6, shews that such affidavit as the prosecutrix was desired to take may lawfully be made; and the Interpretation Act, Consol. Stat. U. C., ch. 2, sec. 15 enacts that "the wilful and corrupt making of any false statement in any declaration required or authorized by any of the Consolidated Statutes of Upper Canada, shall be a misdemeanour punishable as wilful and corrupt perjury." *Rex. v. De Beauvoir*, 7 C. & P. 17. [HAGARTY, J. referred to *Thomas v. Platt*, 1 U. C. R. 217.]

Robert A. Harrison, contra. This indictment charges no offence at Common Law—*Regina v. Collins*, 9 Cox. C. C. 497. An offence will never be intended—Russ. C. & M. Vol. I., p. 45; *Regina v. Daniel*, 1 Salk. 380, 3 Salk. 192, 6 Mod. 99, 2 Lord Raym. 1116; *Rex. v. Philips*, 464:—and the clause of the Interpretation Act creates no offence except by intentment. The Statute which authorizes this affidavit does not make the taking it falsely perjury, and it cannot be so except by express enactment, for it is material to no enquiry. Strictly speaking, it cannot be said with truth that a bastard is the child of any person, for in law it is the child of no one—*Regina v. Fairlie*, 9 Cox C.C. 209.

As to the question of venue, he cited *Regina v. Jones*, 1 Den. C. C. 551; *Regina v. Leech*, Dears. C. C. 642;

Regina v. Mitchell, 2 Q. B. 636; *Regina v. Cryer*, 1 Dears. & B. 324; *Rex v. Burdett*, 4 B. & Al. 95; Rosc. Crim. Ev. 649.

DRAPER, C. J.—The objection that the indictment charges no offence against law might be properly taken in arrest of judgment, or the indictment might have been demurred to, or a writ of error would lie. The point relied upon was that it was not averred that any perjury had been committed; the evidence also confirming this, as no affidavit was made.

The affidavit which it is found that the defendant desired and attempted to procure F. C. to make, is that rendered necessary for certain purposes by Section 6 of Ch. 77, Con. Stat. U.C. which declares, in substance, that no action shall lie against the father of an illegitimate child for necessities furnished to such child (an action created by that statute), unless it be shewn on the trial thereof that while the mother was pregnant, or within six months after the birth of her child, she voluntarily made an affidavit in writing before some one of Her Majesty's Justices of the Peace for the County or City in which she resides, declaring that the person who may afterwards be charged in such action is really the father of such child.

Upon the general question involved in the objection, I find Lord Kenyon, C. J., in *Rex v. Higgins* (2 East. at p. 17), says: "When Lord Holt is stated to have said, that if one should advise another to charge another with a bastard (by which it must be understood that the charge was ill-founded), it would not be indictable, I do not believe that he said so. For it must be remembered that such a charge is made upon oath, and *he never could have said that to suborn a witness to commit perjury was no offence, although the perjury were not alleged to have been committed.* But if he had delivered such an opinion, it is a sufficient answer that the contrary has been expressly adjudged in more modern times by all the Judges in the case alluded to before Mr. Baron Adams, at Shrewsbury, which was quoted

in the case of *Rex v. Schofield* (Cald. 397)." Grose, J. concurred in that view, and said that in *Rex v. Schofield* the case of *Rex v. Johnson* (2 Show. 1), which was a solicitation to commit perjury, was not denied to be law; and added, "All these cases prove that inciting another to commit a misdemeanour is itself a misdemeanour."

And in the case of *Rex v. Phillips* (6 East. 471), Lord Ellenborough said, "The first proposition contended for, that such an endeavour as has been used on this occasion to provoke another to commit the misdemeanour of sending a challenge, is not itself a misdemeanour, cannot be sustained. Although the intended effect may not have been produced, yet the means calculated and likely to produce such effect have been used." The means in that case, in *Rex v. Vaughan* (4 Burr. 2494), and in the present case, are similar—the writing a letter, which is an act done, to cause the party written to to commit a misdemeanour. I refer also to *Rex v. Chapman*, a case reserved by Lord Denman, and decided in Trinity Term 12 Vic. (Temp. & M. 90.)

In Chit. Crim. Law Vol. II, 480, there is a precedent adapted to the evidence given in this case, and there is no allegation that the perjury was committed.

I think it unnecessary to mention other authorities, all tending to the same result.

Another question which might have given rise to serious doubt, was whether such an oath as F. C. would have taken, if she had acted in accordance with the defendant's proposal, would if false have amounted to perjury. The 15th sec. of ch. 2, Consol. Stat. U. C. (the Interpretation Act), settles this, by enacting that "the wilful and corrupt making of any false statement in any such oath or affirmation"—that is an oath or affirmation "directed or authorized to be made before any Court, person, or officer"—shall be a misdemeanour punishable as wilful and corrupt perjury.

Whether, as in *Regina v. Chapman*, the Counts should not have treated the offence (if F. C. had committed it) as a misdemeanour only, and not as the statutory offence of perjury, may still be open to question on this act. But the

record itself shews the objection, if it has any substance. We should not grant a new trial to give an opportunity to the defendant to raise it.

There remains only the question of venue.

The charge is, an attempt to bargain with or to cause and procure F. C. to make a false affidavit. The venue is in the County of York, and the Grand Jury must be taken to be returned to enquire for the body of that County. It appears to me, as there is only one act laid in each count, so there is evidence of one act only of the attempt—an act which is evidence upon either of the counts, which are only different methods of charging the one offence.

The act of attempting to bargain with, or cause or procure, is the writing and sending this letter. It makes no difference whether these be divided, or, as I think they should be, treated as two parts of the same act, if both acts or the one compound act took place at Bradford. The case for the Crown was rested on this letter, dated at and assumed to be put into the post-office at Bradford. No question was raised, that Bradford was not *proved* to be in the County of Simcoe, though the objection was taken by the defendant's counsel at the trial. And during the argument the counsel for the Crown did not object that it was not proved that this letter was written and put into a post-office without the limits of the County of York, nor was a suggestion made that the statutory provision as to acts done within 500 yards of the boundaries had any application. I understood the counsel for the Crown to argue that it was sufficient to shew that F. C. received this letter in the County of York, even although it appeared that defendant wrote it and parted with the control of it in another County, with the intent that F. C. should, as she did, receive it in the County of York.

In the case of *Rex v. Burdett* (4 B. & Al. 126). Best, J., appears to have held that when the defendant in that case put the letter, (for writing and publishing which he was indicted, as being a libel) out of his hands, and so lost the control of it, he had *published* it, and as this happened in

Leicestershire, where he certainly wrote it, he was properly tried in that county. Abbott, C. J., who also upheld the conviction, referred to *Rex v. Williams* (2 Camp. 505), where on an indictment for writing, sending, and delivering a libellous letter with intent to provoke a challenge, the letter being sealed up was put into the post office by defendant in Westminster, addressed to the prosecutor in London, who received it there; and Lord Ellenborough held this was a sufficient publication in Middlesex, by posting the letter there with intent that it should be delivered to the prosecutor elsewhere. Abbott, C. J. pointed out a distinction in cases wherein a misdemeanour composed of acts in different counties, each act being in itself a misdemeanour, has not been held wholly triable in that county wherein any criminal part was committed; and he (p. 180) concludes that if any such part of an entire misdemeanour be proved to have been done in the county in which the indictment is preferred, there is enough to satisfy the locality of the trial. Bayley, J., who did not concur with the other Judges, said (p. 155) the whole offence, the whole *corpus delicti*, must be in one and the same county.

Now I should think the whole offence was completed in the County of Simcoe, if in fact it had been sufficiently proved that the defendant mailed this letter at Bradford, in the County of Simcoe. Lord Ellenboro's language in *Rex v. Williams* leads, I think, to this conclusion. It had, in that case, been proved that the defendant put the letter into a post office in Westminster, and his Lordship said if it had never been delivered the defendant's offence would have been the same. So here, the charge is, an attempt to procure F. C. to commit perjury. The attempt was proved only by proving a letter in the defendant's writing, addressed to and received by F. C. Whether he sent that letter by a messenger or put it into the post with intent she should receive it, provided only that he parted with it with that intent, he would be equally guilty. The moment a man takes one necessary step towards the completion of a misdemeanour, he commits a misdemeanour—*Rex v. Chapman*,

(Temp. & M. 90, 13 Jur. 885). This was done in Simcoe, if the defendant parted with the letter in that county in order that F. C. might receive it. A clear case of agency on the prisoner's behalf in York must be proved, connected with the act in Simcoe, to afford proof of his guilt. The case of *Pearson v. McGowran* (3 B. & C. 700), may also be referred to on this subject.

Suppose the letter had got into the hands of a third party, instead of those of F. C., who perceiving its contents had withheld it from her—was it the less an attempt such as is described in the indictment; or does it matter for what reason the attempt proves abortive, whether because F. C. refuses to commit the offence solicited or because the offer does not in fact reach her. I cannot think it an ingredient in the offence charged, that she should have had the opportunity of accepting or refusing. The whole question was whether the attempt was made; and when the letter was written and sent, was put beyond defendant's control, for the purpose of reaching F. C., I am of opinion the act of crime was complete. The subsequent delivery of the letter to F. C. was no new or separate act of the defendant. The case of *Rex v. Leech* (2 Jur. N. S. 428) was decided on the ground that the case came within the statute, the offence being committed *partly* in one county and *partly* in another, not, as I understood, wholly completed in either.

Upon this ground I at first thought the indictment was not triable in the county of York, and that the rule should be made absolute; but upon going over the evidence again, I find that there is in fact no direct evidence how the letter came out of the defendant's hand. It was undoubtedly received in Toronto by F. C. It was, on the strength of the postmark, apparently assumed that the defendant put it or procured it to be put in the post office at Bradford. The postmark itself was the only evidence of this, and no evidence whatever of its authenticity was given, excepting the fact that the envelope had such a mark upon it. Now Lord Ellenborough in *Rex v. Watson* (1 Camp. 6, 215), held this was not even *primâ facie* evidence of it; and though

Abbey v. Lill (5 Bing. 299) does not affirm this decision, it certainly does not overrule it; see also *Woodcock v. Houldsworth* (16 M. & W. 124). And *Taylor on Evidence*, 4th Ed., Sec. 1274, says, "It seems the genuineness of a postmark may be proved by the opinion of a clerk of the post office, or, perhaps, any one who has been in the habit of receiving letters with that mark." But this is the only fact upon which the contention of the defendant's counsel, that the offence was committed out of the county of York, was rested, and this fact was not proved, while the receipt of the letter by F. C. in that county was established.

HAGARTY, J.—I agree in holding that there is no ground for a new trial.

As to the question of venue, I am of opinion that if a person in the county of Simcoe write a letter addressed to a person in York, inciting the latter to commit a crime, and either send the letter by a messenger to deliver it to the latter in York, or bring it himself and deliver it in York, or mail it in Simcoe addressed to the person in York—that in all these cases the venue is properly laid in York.

The defendant, in one shape or the other, caused the document shewing the attempt or inducement to be received by the prosecutrix in York; therefore I think he may certainly be tried there.

In *Regina v. Leech* (27 L. T. Rep. 128, 2 Jur. N. S. 428), Jervis, C. J. says, "The delivery of the letter through the post in the borough" (where the venue was laid), "was the making of a false pretence there." The defendant in that case wrote the letter and mailed it in the adjoining County. See also Lord Ellenborough's language in 1 Camp. 215.

On the other objection I fully agree with the judgment of the Chief Justice.

I express no opinion as to the prisoner's liability to be tried in Simcoe, and whether the offence be or be not complete unless the inducement was communicated to the prosecutrix.

MORRISON, J., concurred.

Rule Discharged.

VOL. XXVI.

DAVIDSON V. MCKAY.

Registry Act—Leases—Consol. Stat. U. C. ch. 89, sec. 45.

In ejectment the plaintiff claimed through a mortgage from B. dated 31st May, and registered 3rd June, 1864. Defendant had held a lease from B. for five years from the 18th April, 1861, and while it was current, before the execution of the mortgage, he obtained another lease for four years from the 18th April, 1866. Neither lease was registered, but defendant, who had continued in possession, claimed to hold it under the latter, as being a lease for less than twenty-one years "where the actual possession goeth along with the lease," and therefore not requiring registry under Consol. Stat. U. C. ch. 89, sec. 45.

Held, however, that the exception in that clause extends only to unregistered leases, under which the tenants had actual possession at the execution of the conveyance which, being registered, would prevail but for such exception; and that, as the defendant was then in possession under the first lease only, the second being unregistered had lost its priority.

EJECTMENT for one-fifth of an acre of land, part of lot number 21, in the 4th concession of the township of Innisfil, and known as lot number 5, in the village of Lefroy.

The plaintiff claimed title through a deed made by John Douglas Laidlaw, bearing date the 28th May, 1866. The defendant claimed as tenant under a lease from Robert Burns, for a term not yet expired.

The trial took place at Barrie, in October, 1866, before Richards, C. J.

Both parties derived their title through Burns. The plaintiff's title commenced with a bargain and sale by way of mortgage, dated the 31st May, 1864, whereby Burns, in consideration of \$730 50, granted, &c., to the plaintiff in fee the premises in question, subject to a proviso, that if Burns should pay to the plaintiff the sum of \$730 50, with interest at the rate of ten per cent per annum, the principal sum on the 31st May, 1866, and the interest on the 31st May in each year, then the indenture should be void. There were covenants on the mortgagor's part for payment, for good title, right to convey without any manner of trust, reservation, proviso, limitation or condition, to alter, charge, change, encumber or defeat the same, and that after default the mortgagee might enter and possess the premises, free and clear of all former conveyances, &c.; and, after other covenants and agreements, it was declared that if the mortgagor

should make default in payment of principal and interest according to the proviso, and after the lapse of one calendar month from such default, the mortgagee might enter and take the rents, and might sell the mortgaged premises and convey the same to the purchaser.

By indenture, dated 27th October, 1865,—reciting the mortgage and that one year's interest became due on the 31st May, 1865, and remained unpaid one calendar month, and that the plaintiff on the 7th of September, 1865, advertised the lands for sale on the 3rd of October then next, when, the interest being still unpaid, the lands were sold to one John Ross for \$800—it was witnessed that, in consideration of the premises, and of \$800, the plaintiff granted unto the said John Ross the same land, *habendum* in fee.

By indenture, dated 16th November, 1865, the said John Ross, in consideration of \$1000, granted the same land to one John Douglas Laidlaw, in fee; and by deed dated 28th May, 1866, the said John Douglas Laidlaw granted the same land to the plaintiff in fee.

The mortgage was registered on the 3rd of June, 1864, and the other deeds were registered shortly after their respective dates. The summons in ejectment was tested 27th July, 1866.

On the defence, an indenture of lease was put in, dated 18th April, 1861, made between Burns and the defendant, whereby Burns demised the premises in question to the defendant to hold for five years from the 18th April, 1861, yielding and paying £35, to be paid on or before the 18th April in each year during the term, the first payment to become due on or before the 18th April then next. On this lease was indorsed a receipt, dated 18th April, 1861, for two years' rent, and a second receipt, dated 18th April, 1863, for the remaining three years' rent.

Another indenture of lease, dated 30th May, 1864, made between Burns and the defendant, was also put in, whereby Burns demised the same premises to the defendant, to hold for four years, to be computed from the 18th April, 1866, yielding and paying to Burns \$140, to be paid as in the former lease; with a power to the lessee to insure his

interest in the premises for a named sum, and an agreement that the lessor would pay the lessee the amount, with interest at ten per cent, that was paid for such insurance, and that if the lessor failed to pay, the lessee might hold the demised premises at the rate of \$140 per annum for a sufficient time to pay the amount paid by the lessee for insurance against any loss. On this lease was indorsed a receipt dated 1st August, 1864, acknowledging payment to the lessor of "the full amount due me on within lease."

The precise day when this second lease was executed was not proved, but Burns swore it was before he executed the mortgage. The jury were asked to find whether the lease was executed before the mortgage, and they found that it was; and the learned Chief Justice directed a verdict for the plaintiff, with leave reserved to the defendant to move to enter a non-suit, or a verdict for himself.

In Michaelmas Term, *McMichael* obtained a rule calling upon the plaintiff to shew cause why a verdict for defendant or a non-suit should not be entered, pursuant to leave reserved; or for a new trial, on the ground of misdirection, in directing that the second lease required registration as against the mortgage.

In this Term *Snelling* shewed cause, and cited *Com. Dig. Estate* (G. 14) p. 97; *Woodf. L. & T.* 118, 119; *Smith L. & T.* 13, note 21; 1 *Wms. Saund.* 250 f, note b; *Fury v. Smith*, 1 *Hud. & Br.* 735; *Popham v. Baldwin*, 2 *Jones* 320; *Preston on Conveyancing*, Vol. II. p. 145; *Doe dem. Kingston Building Society v. Rainsford*, 10 *U. C. R.* 236; *Clarke v. Armstrong*, 10 *Ir. Chy. Rep.* 263; *Lessee of Fleming v. Neville*, *Hayes Rep.* 23; *Warburton v. Loveland dem. Ivie*, 2 *Dow. & Cl.* 489, 494.

M. Cameron, Q. C., and *McMichael* supported the rule.

DRAPER, C. J.—The second lease, though the term therein mentioned was not connected with the first, was to commence on a day immediately after the first would expire. It would have no effect for nearly two years, and gave in the interim

an *interesse termini*, a right to enter on a future day. Till that day arrived the lessee could not take possession under it, and until he did enter under it he was not possessed of the demised premises for the second term. But having possession lawfully under the first lease, and the second term in fact commencing immediately upon the expiration of the first, he might, at least as between himself and Burns, lawfully continue in possession, thus in effect entering under the second lease.

The plaintiff's title, being under a conveyance subsequent in point of time to the second lease, must fail in this action, unless he can avoid it; and his contention is that the lease not having been registered at all, while his mortgage was registered while the defendant had only an *interesse termini*, such lease is void against him. He relies on the 45th section of the Registry Act, Consol. Stat. U. C. ch. 89, which was in force up to the 31st December, 1865.

This lease would unquestionably come within the definition contained in the 44th section, as a "deed or conveyance made and executed of the lands, tenements or hereditaments, or any part thereof, comprised or contained" in the memorial of the mortgage, but for the 45th section, which declares that the act shall not extend to any lease for a term not exceeding twenty-one years "*where the actual possession goeth along with the lease.*" This exception plainly shews the statute was intended to embrace all deeds creating terms for years which would not come within its true meaning.

I am not satisfied, on considering the evidence, that the real intention of the parties to the second lease was not to create a term of four years in the premises to secure and satisfy an existing debt due by Burns to the defendant. But this view of the transaction was not taken at the trial or since, and the question as presented to us after the finding by the jury assumes this to be a lease to commence *in futuro*, executed before the mortgage to the plaintiff, but unregistered.

At the time of the execution of the mortgage the defendant was in possession, and had a lease which had nearly

two years to run. I look upon this lease, though unregistered, to come both within the letter and the spirit of the 45th section; the actual possession went along with it.

I have not overlooked the equitable doctrine, that the purchaser of an estate which he knows is in the possession of another than the vendor is bound by all the equities which the party in such occupation may have in the land, nor that the equity of such occupant extends not only to interests connected with his tenancy, but also to interests under collateral agreements. If a purchaser during the currency of a term had notice from the vendor of possession by a tenant under a lease, which lease, (though the purchaser did not know it) contained a covenant for renewal, I assume the purchaser would be bound; and it may be in the present case that in equity it would be held there was notice of the second lease. But I found no conclusion upon the applicability or inapplicability of the equitable doctrine, because I consider the case depends entirely upon the construction of the statute.

In my opinion, a tenant having an unregistered lease for a term not exceeding twenty-one years, and being in actual possession under that lease, is clearly protected against a deed subsequently executed, which conveys the premises and is registered. The unregistered lease and the possession are connected together, and the *two united* prevail against the registered title. But it does not follow that a tenant having possession under a current lease, which is his sole title, can set up the possession as sustaining a lease for a term to commence *in futuro*, and to bring it within the exception contained in the 45th section, for such possession cannot be said to go along with a lease under which as yet there is no right of entry or possession.

The mortgage had become absolute before the first term expired, and gave an immediate right of entry unless defeated, or rather postponed as to entry, by the second lease. When this mortgage was executed, the defendant was in actual possession under the first lease, not under the second, and therefore, to retain the priority which he had acquired

by the latter over the subsequently executed mortgage, I think he should have registered it. Not having done so, and the mortgage having been registered, I am of opinion the right of entry under the registered instrument must prevail, and that the second lease has become as against the plaintiff's claim fraudulent and void.

No authority was referred to in support of defendant's contention, which appears to me to be at variance with the policy of the Registry Act; and in a case which in view of all the surrounding circumstances bears the appearance of an unregistered security for a debt, rather than of an ordinary lease, which it is in form, I feel averse to adopting the construction put by the defendant's counsel on the statute, under which the possession of the defendant while he held one unexpired lease of the premises, is to be held a possession which goes along with another lease to commence at a future day, two or ten years it might be, after its execution.

I think it better to hold that the exception in the 45th section extends only to unregistered leases under which the tenants had actual possession at the time of the execution of the conveyance which, being registered, would prevail but for the exception, under the plain language of section 44.

In my opinion the rule should be discharged. See *Lock v. Furze*, (11 Jur. N. S. 726, 19 C. B. N. S. 96), especially *Sir Wm. Erle's* words as to possession, at page 116.

HAGARTY, J.—I am of the same opinion. If the statute had required that all leases must be registered, I think it clear that the second lease would be postponed to the mortgage, registered as this was, and could gain no advantage by its being executed during the currency of the first term, and during a possession thereunder. It would be in no better position than a second mortgage, legal or equitable, by further charge or otherwise, to a first mortgagee, under the immediately preceding section of the act. The "actual possession going along with the lease" can, I think, have only one meaning, and cannot extend to a lease to commence at a future day, under which no possession can as yet be

going. If defendant's view be right, I see no reason why a lessee in possession under a twenty years' lease may not in the tenth or twelfth year of his term take another lease for twenty years, commencing at the end of his first term, and so claim to hold the land for forty years under unregistered instruments against a purchaser registering his deed (as in this case) the day after the execution of the second demise.

The note at the end of this 45th section in the Consol. Stats. says, "See ch. 83, sec. 31." This section is in the "Estates Tail" Act in the same volume, and provides that no assurances or disposition of land under this act by a tenant in tail, shall have any operation under the act unless registered in six months, except a lease for any term not exceeding twenty-one years, *to commence from the date of such lease, or from any time not exceeding twelve months from the date of such lease, &c.*, at a rack rent, &c. This provision further illustrates the policy of the registry law.

MORRISON, J. concurred.

Rule discharged.

REGINA V. GEMMELL.

False Pretences.

On an indictment for obtaining money by false pretences, it appeared that G., the prisoner, and another, were in a boat on the bay, and the prosecutor, M., agreed with them to take him to meet the steamer, G. saying the charge would be 75 cents at the steamer. The prosecutor, according to his own account, took out a \$2 bill, saying he would get it changed. Prisoner said "I'll change it," upon which the prosecutor handed it to him, and he shoved off with it. Other witnesses represented the prisoner's statement to be that he had change. The prosecutor did not say what induced him to part with the money.

Held, that a conviction could not be sustained.

CASE reserved from the Recorder's Court, Toronto.

Indictment for obtaining money by false pretences.

The prisoner and one Collins were in a boat on the bay. The prosecutor, Menzies, and two companions were on the

island, and agreed with those in the boat to take them to meet the steamer. Conlin, one of the two, said the charge would be 75 cts. At the steamer the prosecutor took out some silver, and handed to Conlin 35 or 40 cents, being all the silver he had, and took out a \$2 bill, saying he (prosecutor) would get it changed. Prisoner said "I'll change it." Prosecutor handed him the bill. He put it into his pocket and pushed off. Prosecutor asked him to return it. He said "No, we have earned it." He kept it.

Another witness swore that he heard Conlin say the charge was 75 cents, and prosecutor handed a \$2 bill to Conlin to change. Conlin handed it back, saying he could not change it. Prisoner said he would change it, and prosecutor handed it to him. Prisoner took it, saying it was well earned. Prosecutor asked him for the change. Prisoner told him his right name, and where he lived, and they shoved off. The witness further said that the prisoner said he could change the bill, before it was given to him.

Conlin was also called by the Crown. His evidence was the same in substance:—that after he had handed the bill back to prosecutor, the latter said to prisoner, "Have you change," Prisoner said, "I think I have," and prosecutor then gave him the bill. Prisoner put it in his pocket, pulled out some silver, and said "I have not enough change," and with that, the boat being in danger of the steamer's paddles, Conlin shoved off. Prosecutor called them scoundrels, and prisoner called out his true name and residence, and told prosecutor if there was any change to come to him. Conlin said he considered the 75 cents was for himself: that the prisoner had some change, but not enough; prisoner told prosecutor it was little enough for their trouble.

Another witness said the prisoner said he could change the bill, and the prosecutor did not ask him. Another said that the prosecutor did ask him, could he change it? prisoner said he thought he could, and prosecutor then gave him the bill; prisoner put his hand into his pocket, and

then said "I can't change it;" Conlin cried, "Look out," and the boat pushed off.

The learned Recorder explained the law as to larceny, and as to a conviction for false pretences, and asked the jury whether the prisoner represented to the prosecutor that he then had the change to give him for the bill, and if on that representation he obtained it for the alleged purpose of changing it, whether at the time he obtained it he really had the change mentioned, or was his representation in that respect false, and used as a pretence to get the bill; if so, he would be guilty:—that if he did not make such representation, or, if having so made it, he did not obtain the bill from the prosecutor thereupon, or having obtained the bill on such representation, and having in fact the change to give, although wrongfully withholding the change and retaining the bill—in either of these instances the prisoner would not be guilty.

The jury convicted the prisoner; and the case was reserved for the opinion of this Court.

Doyle, for the prisoner, cited *Rex v. Goodhall*, Russ. & Ry. 461; *Rex v. Douglas*, 1 Moo. C. C. 462.

Robert A. Harrison, contra, cited *Rex v. Crossley*, 2 Moo. & Rob. 18; *Regina v. Giles*, 11 L. T. Rep. N. S. 643, S. C. 10 Cox C. C. 44; *Rex v. Jackson*, 3 Camp. 370; *Regina v. Woolley*, 1 Den. C. C. 559; *Regina v. Hughes*, 1 F. & F. 355; *Regina v. Naylor*, 13 L. T. Rep. N. S. 381

HAGARTY, J., delivered the judgment of the Court.

We think the learned Recorder correctly stated the law to the jury.

Sir William Erle said, in *Regina v. Giles*, (11 L. T. Rep. N. S. 643, 10 Cox C. C. 44) "I take the law to be that there must be a false pretence of a present or a past fact, and a promissory pretence to do some act is not within the Statute." And again he says, "Was the prosecutor induced by means

of that false pretence, and on the faith of its being true, to part with the money?"

The "existing fact" pretended by prisoner here is, that he had sufficient money to change the \$2 bill. There is evidence that the prisoner said he could change it, and that thereupon the prosecutor gave him the bill. And there is also evidence (Conlin's) that he had *not* the means of changing it.

It is singular that the prosecutor himself was apparently not asked nor does he say what induced him to give the bill to the prisoner. He swore the latter said "I'll change it," (not "I *can* change it,") and he then handed it to him. The direct evidence of the allegation that the prisoner averred he had the means of changing the bill came from another witness.

The jury took the view of the evidence most unfavorable to the prisoner.

This case is open to the difficulty as to what induced the prosecutor to part with his money. If it was on a mere promise to get change, or to change it, the case would fail. The testimony of the witnesses leaves the operating inducement in the prosecutor's mind a matter of speculation. No one but himself could tell as a matter of fact what did so act as inducement, and he gives no account of it whatever.

In the very peculiar case of *Regina v. Giles*, where the charge was that defendant obtained money and clothes, pretending to the possession of supernatural power to bring back a truant husband to an ignorant wife, accompanied by a promise so to bring him back, the prosecutrix swore, after narrating the conversation and the prisoner's assertion, "I parted with the money and the dress on the faith of what had passed between us on that first occasion."

As Cockburn, C. J., remarks in *Regina v. Mills* (29 L. T. Rep. 114) "The question is whether the false representation is the *motive operating* on the mind of the prosecutor, and inducing him to part with the money." In that case, when the prosecutor parted with the money he was aware of

the falsehood of the representation, and was laying a trap for the defendant, and an acquittal was directed.

If the prosecutor here had died before trial, and the rest of the evidence only had been given, there would be a difficulty as to the "motive operating" on his mind—whether it was the representation that the prisoner had the means to change, or whether it was merely his promise to change. The prosecutor's own statement is that the prisoner said, "I'll change it."

So in Mills's case, just mentioned; if the prosecutor had died before trial, and others present, who were not aware of what the prosecutor knew, but who proved the pretence, its falsehood, &c., and the payment of the money, a conviction obtained on their testimony would be clearly erroneous in fact.

In *Regina v. Hewgill* (1 Dears. C. C. 315), the prosecutor swore it was partly on the alleged existing fact and partly from a receipt produced, and other things, that he parted with the money, and the jury found that the inducement was proved and acted on by the prosecutor; and this was upheld on a case reserved.

In the case before us, we think the conviction for obtaining money on false pretences cannot be upheld, and must be quashed.

Conviction quashed.

REGINA V. CONNOLLY.

Assault with intent to ravish—Insanity—Consent.

In the case of rape of an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent—*e. g.* that she was incapable, from imbecility, of expressing assent or dissent; and if she consent from mere animal passion, it is not rape.

In this case the charge was assault with intent to ravish. The woman was insane, and there was no evidence as to her general character for chastity, or anything to raise a presumption that she would not consent. The jury were directed that if she had no moral perception of right and wrong, and her acts were not controlled by the will, she was not capable of giving consent, and the yielding on her part, the prisoner knowing her state, was not an act done with her will. They convicted, saying she was insane and consented. *Held*, that the conviction could not be sustained.

On an indictment for attempting to have connection with a girl under ten, consent is immaterial, but in such a case there can be no conviction for assault if there was consent.

CASE reserved from the Quarter Sessions of the County of Simcoe.

Indictment for assault with intent to ravish.

The evidence was that the person assaulted was a married woman, who for some few years past had been insane. The prisoner was caught in the act of attempting to have connection with her. The learned Judge told the jury "that if upon the evidence they were satisfied that the woman was of unsound mind, that she had no moral perceptions of right or wrong, that her acts were not controlled by the will, were in fact involuntary, she could not be said to be capable of giving consent, because by reason of her state of mind incapable of judgment and discretion; and the yielding on her part to force ought not, in view of such impotence of her will (and knowledge of her state by defendant), to be taken as an act done with her will."

The charge was objected to on behalf of the prisoner, and it was contended that there was no evidence of want of consent necessary to constitute an assault; that the jury should be told that if they could find a solution consistent with innocence, they ought to acquit.

The jury found the prisoner guilty, and in answer to the Court said that the woman was insane at the time the

offence was committed, and that she was a consenting party to what the prisoner had done.

McCarthy, for the prisoner. 1. There can be no assault when the person said to be assaulted consents, and the jury having found consent here, the prosecution must fail. An assault implies that it was committed against the will of the party—*Russell on Crimes*, 4th Ed. Vol. 1, p. 1023; *Regina v. Meredith*, 8 C. & P. 589; *Regina v. Martin*, 9 C. & P. 213; *Regina v. Read*, 1 Den. C. C. 377; *Regina v. Cockburn*, 3 Cox C. C. 543. 2. But the charge here is of assault with intent to ravish. Now the finding of assent negatives the intent, for when all that took place was with the consent of the woman, it cannot be said that the intent was to commit an act against her will. If it be held that an insane person cannot consent, then any attempt to take indecent liberties with such person must be an attempt to rape. There was no fraud in this case, and no force used by the prisoner. *Regina v. Charles Fletcher*, 12 Jur. N. S. 505, per *Pollock*, C. B., S. C. 14 L. T. Rep. N. S. 573; *Regina v. Stanton*, 1 C. & K. 415; *Regina v. Richard Fletcher*, Bell C. C. 63; Jur. of August 18th, 1866, p. 327, Leading Article.

Robert A. Harrison, contra. The indictment here is not for a rape, but for an assault with intent to commit it, and there is a difference between the two charges, as regards the will—*Regina v. Stevens*, 1 Cox. C. C. 225. There must be not only a consent from mere animal passion, but a consent of the reason—*Regina v. Ryan*, 2 Cox C. C. 115; *Regina v. Page*, 2 Cox C. C. 433. The jury here have found the woman insane, and where this is the case, and a person knowing it attempts to have connection, he is guilty. The charge is assault with intent; an assault in law was proved, and the consent given was, under the circumstances, immaterial; it was proved here that the prisoner was aware of her insanity—*Regina v. Fletcher*, 8 Cox C. C. 131, 134. According to the argument for the prisoner, every idiot found on the street might be ravished with impunity. *Regina v. Clarke*,

6 Cox C. C. 412; *Regina v. Francis*, 13 U. C. R. 116; and *Regina v. Sweeney*, 8 Cox C. C. 223, were cases in which the woman believed the person to be her husband, and the last case holds that it may be rape, notwithstanding.

In *Regina v. Fletcher*, 8 Cox C. C. 133, a definition of rape is given, which is approved of in *Regina v. Jones*, 4 L. T. Rep. N. S. 154. There can be no consent by an idiot or insane person, and the connection even by consent must therefore amount in law to rape.

HAGARTY, J., delivered the judgment of the Court

The latest case on the subject that we have seen is *Regina v. Charles Fletcher* (14 L.T. Rep. N.S. 573). The charge was rape on an idiot girl. Keating, J., left it to the jury in the terms used by Willes, J., in *Regina v. Fletcher* (8 Cox C. C. 131), that if they were satisfied that the girl was incapable of expressing consent or dissent, and that the prisoner had connection with her without her consent, they should find him guilty; but that a consent produced by mere animal instinct would be sufficient to prevent the act being a rape. The verdict was guilty. Pollock, C. B., delivering judgment said, there was no evidence except the fact of connection and the imbecile state of mind of the girl. Of the fact of connection there was the fullest proof, for it was admitted by the prisoner. There was, however, no evidence that it was against her will. "We are all of opinion that some evidence of that as a fact should have been given before a conviction could be obtained; and there was not that sort of testimony on which a Judge would be justified in leaving the case to the jury to find a verdict. We are unanimously of opinion that there was here no evidence to establish either that this connection was against her will or without her consent. * * Here the contention on the part of the Crown must be that an idiot is incapable of consent, and it might be said in answer that the same cause which required an Act of Parliament to make the mere fact of connection a criminal offence in the case of children of tender years, would require an Act of Parliament in the case of idiots."

There was no evidence in this case except the prisoner's admission ; and a medical man testified that she was a fully developed woman, and that strong animal instinct might exist notwithstanding her imbecile condition.

In *Regina v. Beale* (L. R., 1 C. C. 11), the first count was for unlawfully attempting to have carnal knowledge of a child under ten years ; the second for assaulting with intent ; and the third for an indecent assault. The jury found a verdict " Guilty, for that the child was too young to know what she was doing, and therefore consented to the act done by the prisoner." On a case reserved, Pollock, C. B. said that consent was altogether unimportant ; the facts shewed an attempt to commit a crime where consent was immaterial, adding, " Of course, if the indictment had been merely for an indecent assault, the question of consent would have become material."

In *Regina v. Cockburn* (3 Cox C. C. 543), for feloniously knowing a child under ten, the principal charge could not be supported, and the prosecutor urged that there could be a conviction for an assault. Sir J. Patteson said " A child under ten years of age cannot give consent to any criminal intercourse, so as to deprive that intercourse of criminality, but she can give such consent as to render the attempt no assault. We know that a child can consent to that which, without such consent, would constitute an assault." This case was cited in *Regina v. Beale*.

Regina v. Fletcher (8 Cox C. C. 131, 32 L. T. Rep. 338), was a charge of rape of an idiot girl aged thirteen ; verdict guilty, and that the jury considered her incapable of giving consent, from defect of understanding. Willes, J. mentioned the direction he had given in a case at the Old Bailey, already cited ; and Lord Campbell said " That direction was in accordance with Complin's and Ryan's cases. But here there was no evidence of that kind" (viz., consenting from animal instinct), " but rather to the contrary. * * If the offence is complete where it was by force and without her consent, then the offence is proved that was charged in the indictment, and the prisoner was properly convicted. Comp-

lin's case settles the definition of the offence, and all the ten Judges concurred in that. That definition includes the present case, the only difference in this being that here the prosecutrix was not capable of giving consent. But then the prisoner knew her condition at the time." See also *Regina v. Jones* (4 L. T. Rep. N. S. 54), where a father was indicted for a rape of his daughter, when Channell, B. directed that if the prisoner had established a reign of terror over his daughter, in consequence whereof she did not resist, the jury might convict.

Regina v. Read (1 Den. C. C. 377), was a case of common assault, but the evidence shewed that defendant had connection with the girl, she being nine years old. The jury found a verdict of "guilty, the child being an assenting party, but from her tender years she did not know what she was about." The Court, consisting of Lord Denman, Alderson and Parke, B.B., and Coltman and Coleridge, J.J., held that it had been solemnly decided that if the girl assents, the act is not an assault.

There are several cases of assaults on girls between ten and twelve.

Regina v. Meredith (8 C. & P. 589), was an assault with intent. The prosecution gave up that she had not consented, and Lord Abinger directed an acquittal, saying that "to support a charge of assault you must shew an assault which could not be justified if an action were brought for it, and leave and license pleaded."

In *Regina v. Martin* (9 C. & P. 213), the first count charged a carnal knowing of a girl between ten and twelve; the second count was for assault with intent to know; the third for common assault. The evidence failed to prove the first count, but there was clear proof of the attempt, with consent. Alderson, B., after a verdict finding consent on the second and third counts, reserved the case, and the Judges held that as there was consent it was not an assault. By direction of the Court he was again indicted for the attempt to commit a misdemeanor, although the offence was not an assault. He was accordingly indicted on a count setting

forth the acts done, and that he did thereby unlawfully attempt to carnally know and abuse, &c., *contra pacem*, not charging an assault. Patteson, J., quashed the indictment for omitting to state the girl's age, and said, "Where the essence of the offence charged is an assault, (and there can be in law no assault unless it be against consent,) this attempt, though a criminal offence, is no assault. * * It is perfectly clear that every attempt (not every intention but every attempt) to commit a misdemeanour is a misdemeanour."

Regina v. Mehegan (7 Cox C. C. 145), was an assault with intent, &c., on a girl between ten and twelve. The conviction was quashed, the Judge refusing to tell the jury that if the girl assented, there could not be a verdict of guilty.

In *Regina v. Johnson* (10 Cox C. C. 114, 12 L. T. Rep. N. S. 503), the prisoner was convicted of indecent assault of a girl between ten and twelve; verdict, guilty, but that she consented. The case was reserved, and Cockburn, C. J. said, "This case is quite concluded by the authorities, which rest on a very intelligible principle. Independently of the statutes, the having carnal knowledge of a child was not an offence at law. The statutes made it an offence, saying that whether the child was an assenting party or not, it should be an offence. It follows, therefore, that the offence in this case, not being an offence within any statute, it was not an offence at common law."

Regina v. McGavaran (6 Cox C. C. 65), was for an indecent assault on a girl of thirteen. Williams, J. told the jury that that there was no doubt it was against her will, considering her tender age. The defendant was her schoolmaster.

In *Regina v. Ryan* (2 Cox C. C. 115) the indictment was for rape on an idiot girl, before Platt, B. The girl's father gave evidence of her general decency and propriety; and the Judge told the jury "It seems that she was in a condition incapable of judging, and it is important to consider whether a young person in such a state of incapacity, was likely to consent to the embraces of this man; because if her habits,

however irresponsible she might be, were loose and indecent, there might be a probability of such consent being given, and a jury might not think it safe to conclude she was not a willing party. But here the presumption is, that she would not have consented, and if she was in a state of unconsciousness at the time the connection took place, whether it was produced by any act of the prisoner, or by any act of her own, any one having connection with her would be guilty of rape. If you believe she was in a state of unconsciousness, the law assumes that it took place without her consent, and the prisoner is guilty."

We gather from all these cases, that in the case of a child under ten years of age, if the indictment be for the misdemeanour of attempting to commit the statutable felony, consent becomes unimportant :

That in such a case, on an indictment for the principal offence there cannot be a conviction for the assault, if there be consent to what was done, nor for an assault independently charged :—

That in the case of girls from ten to twelve, on a charge of assault with intent to carnally know, or indecent assault, or common assault, consent is a defence :—

But that the prisoner may be indicted for attempting to commit the statutable misdemeanour, not charging an assault, in which case it seems consent is no defence, according to *Regina v Martin*, already cited :—

That in the case of rape of an idiot or lunatic woman, the mere proof of the act of connection will not warrant the case being left to the jury ; there must be some evidence that it was without her consent—*e. g.* that she was incapable of expressing consent or dissent, or from exercising any judgment upon the matter, from imbecility of mind or defect of understanding : that if she gave her consent from animal instinct or passion, it would not be rape.

To apply these principles to the case before us. The jury might, on the evidence, have perhaps justly arrived at the conclusion that there no consent in fact, from the account given by the witnesses as to what they heard the woman cry out as they approached.

But after they were told by the learned Judge that if they were satisfied she was of unsound mind, with no moral perceptions of right and wrong, that her acts were not controlled by the will, and were in fact involuntary, she could not be said to be capable of consent, and from her state of mind and impotence of will the yielding on her part to force ought not to be taken as an act done with her will—then when the jury so instructed found that she was a consenting party to what the prisoner did, we cannot but feel that the case presents a difficulty.

We may assume the jury took the law from the Court, as they should have done, and with that instruction as to what would be and would not be a consent, find that there was consent—not qualified (as in many of the cases noticed), as that from the state of her mind or unconsciousness either of the nature of the act, &c., &c., she consented; but generally. It is true they also found that she was insane at the time.

This suggests another aspect of the case. No question seems to have been asked or evidence given of the unfortunate woman's habits or character for decency or chastity. She was a married woman, with children, and was found to have acted at various times in such a strange manner as to furnish strong evidence of hallucination and delusion, warranting the jury in finding her, in popular language, insane.

But, quite consistently with the existence of insane delusions, there might be in the woman's mind perfect delicacy of feeling and chastity that would revolt from criminal intercourse, and, on the other hand, perfect consciousness of the impropriety and indecency of such intercourse. In the case of a mind in the latter state, however otherwise liable to delusion, we hardly see how the law could presume the absence of legal consent on the grounds suggested to the jury, in the face of evidence of consent in fact, which we must presume the jury found here.

The case may be summed up thus :

There is no evidence whatever as to the woman's general character for decency or chastity, or any thing to raise a

presumption that she would not consent to the alleged outrage upon her. There is evidence of insane delusion of some years standing, unconnected with anything relating to matters of this kind. The jury, on a view of the law certainly not too favorable to the prisoner, while they find the insanity, also find that she was a consenting party, not qualifying the latter finding.

We think this conviction cannot be supported.

We have treated the case throughout in the view least favorable to the prisoner, and our remarks would more pointedly apply to a case where the connection had actually taken place.

On a charge like the present, of an assault with intent to ravish, it would seem, on the decided cases, to be impossible to support a conviction where there is consent found.

As the Chief Baron remarked, there is no Act of Parliament declaring the fact of criminal connection with an idiot or lunatic to be an offence, as in the case of children of tender years.

In the principal offence, consent from mere animal instinct has been held to be a defence in the case of an idiot.

It is impossible to say that it must not be equally so in the lesser charge of assault with intent, and equally impossible when a consent in fact is proved. In the case of the idiot, the lunatic, the drunken, or insensible, the crime can only be complete on the actual or the legal deduction that the connection took place without consent.

In what manner the absence of such consent has been presumed or inferred has been already considered.

Conviction quashed.

REGINA V. KENNEDY.

Counties of York and Peel—Separation—Jury.

By proclamation published on the 15th December, 1866, the County of Peel was separated from York from and after the first of January, 1867. On the 23rd of November preceding, the usual precept had been sent to the Sheriff of the United Counties for the Winter Assizes for York, to be held on the 10th January, 1867, and the Sheriff returned his panel to that precept, containing 54 jurors from York and 30 from Peel. Only those from York however attended, and the prisoner was tried by a jury *de medietate*, including six of these jurors, upon an indictment found and pleaded to at the previous Assizes in October. On motion for a new trial, or *venire de novo*, because the precept and panel should have been for York only, not for the United Counties—

Held, per *Draper*, C. J., that the objection, if available at all, must be taken by writ of error.

Per *Hagarty*, J., no objection would lie.

FELONY, under C. S. U. C. ch. 98, for invading the country, &c. The prisoner was indicted as a citizen of a foreign country, and found guilty.

K. McKenzie, Q. C., moved for a new trial on the law and evidence and the weight of evidence;

And because J. R., J. A., B. C., J. B., J. C. and P. R., (six jurors) were impanelled and sworn to try the prisoner, although their names were not contained in any panel of petit jurors returned by the Sheriff of the County of York for the Court of Oyer and Terminer and General Gaol Delivery for the County of York, at which the prisoner was tried, and the said jurors were challenged before they were sworn, and their names did not appear on any lawful panel of petit jurors returned to the Court.

Or for a *venire de novo*, because there had been a mis-trial, on the grounds aforesaid, and because the said jurors were drafted at the trial from a panel of petit jurors returned by the Sheriff of the United Counties of York and Peel from the body of the United Counties, selected on the 4th December, 1866, upon a precept issued to him in that behalf on the 23rd November, 1866: that the panel from which the said jurors were drafted at the trial was a panel made up and returned from the body of the United Counties before the separation of the two Counties, and not from a panel selected from the County of York after its separation from Peel:

And that the panel of petit jurors returned by the Sheriff of the said Court of Oyer and Terminer contained the names of 54 jurors from the County of York, and the names of 30 jurors from the County of Peel, and by the precept the Sheriff was commanded to return a competent number of petit jurors, not less than 84, to serve at the Court, and he only returned 54 from the County of York: that there had been no precept to the Sheriff of the County of York after the separation, or a lawful panel of petit jurors returned by him to the said Court of Oyer and Terminer and General Gaol Delivery for the County of York, out of which the jurors could be drafted, chosen and sworn to try the prisoner.

On moving the rule Mr. McKenzie put in a certificate, under the hand of the clerk, and under the seal of this Court, of the names of the jurors by whom the prisoner was tried; also a detailed statement of the evidence and proceedings of the trial of the prisoner, certified by Mr. Justice Morrison; also a certificate under the hand of the clerk and under the seal of the Court, of a true copy of the grand and petit jury panel, with precept annexed, for the Winter Assizes for the County of York, held at Toronto, on Thursday, 10th January, 1867, and of the indictment, found at the Fall Assizes for the United Counties of York and Peel, held at Toronto, on the 1st of October, 1866, against the prisoner, together with the indorsements thereon, remaining of record, &c.

This panel of petit jurors was returned to the precept, which was for the return of not less than eighty-four to serve as petit jurors, and was (of necessity, from its date) addressed to the Sheriff of the United Counties. The six jurors named in the motion paper were all named in it, and according to the panel they were all residents of the County of York.

There was no affidavit of any kind filed on the application, but the report of the learned Judge stated that the prisoner prayed, as an alien and American citizen, for a jury *de med. ling.*: that he granted a venire; and that the Sheriff returned

a panel of alien jurors: that the prisoner's counsel objected to the ordinary panel, and challenged for cause, that the panel produced was of jurors for the United Counties of York and Peel under a precept dated 23rd November last, authorizing the Sheriff to summon jurors for the United Counties of York and Peel, and there was no precept or panel of jurors for the County of York for this Court (*i. e.* the Court then sitting): that the names of the jurors were not on any panel under a precept for the County of York.

Rex v. Tremearne, 5 B. & C. 254; *Fermor v. Dorrington*, Cro. Eliz. 222; *Calthorp v. Woodward*, Ib. 257; *Rex v. Channens*, 1 Moo. C. C. 374; *Rex v. Fowler*, 4 B. & Al. 273; *Regina v. Campbell*, 11 Q. B. 799; *O'Connell v. The Queen*, 11 Cl. & Fin. 155, were cited in support of the application. The statutes referred to are cited in the judgments.

DRAPER, C. J.—The Counties of York and Peel were united for judicial and some other purposes by Consol. Stat. U. C. ch. 3, sec. 2; and by Stat. 29–30 Vic., ch. 71, the Governor in Council was authorized, notwithstanding anything contained in the 51st section of ch. 54, Consol. Stat. U. C., to issue a proclamation declaring that the separation of the County of Peel from the County of York should take effect from a date named therein, and the act declared that such separation accordingly should take place from such day, and have the same effect on or after such day, to all intents and purposes whatever, as if such proclamation had been issued and such separation had taken effect according to the terms of the said 51st section. Under this authority, on the 15th December, 1866, (possibly an extra *Gazette* issued a few days earlier, but this was the date of the regular weekly *Gazette* in which the proclamation first appeared) a proclamation issued, dated 8th December, 1866, directing that on, from and after the 1st January, 1867, the separation should take effect. Under sec. 51 of ch. 54, above referred to, the separation could only take effect on the first day of January next after three months from the date of the proclamation.

The Courts fixed and announced the days for holding the Winter Assizes on the 19th November last, and the precepts for the summoning of jurors for those Assizes were issued to the Sheriff on the 23rd of the same month. The last day of that term was the first day of December.

The 60th section of the jury act requires that such precept shall be issued as soon as conveniently may be after the day is known upon which such precepts are to be returned, which at the earliest cannot be until the term preceding the intended Assizes. Then under secs. 78 and 79 the Sheriff should give eight days' notice of the drafting the panel of jurors from the jury list, and the jurors should, under the 87th section, be summoned eight days at least before the day on which they should attend.

The 139th section expressly declares that no omission to observe the directions in this act, or any of them, as respects (among other things) "the selecting jury lists from the jurors' rolls," or "the drafting panels from the jury lists," shall be a ground of impeaching the verdict in any cause, or be allowed for error upon any writ of error or appeal to be brought upon any judgment rendered in any case, criminal or civil, by any Court in Upper Canada.

The new Municipal Act, 29-30 Vic., ch. 51 (like the proclamation separating the Counties) took effect on the 1st January last. It re-enacts the previously existing provisions upon this subject, and the 52nd, 53rd and 55th sections alone need be specially noticed, the former authorizing a change of venue to the new County, the latter enacting that if "no such change be directed, all such actions, informations, indictments, and other judicial proceedings shall be carried on and tried in the senior County." The 55th section continues the jurisdiction of the Courts of the senior county over prisoners within the gaol, and persons under recognizance to appear for trial in any Court in the senior County, who have not been indicted before the disunion, and authorizes their trial, &c. We may surmise from what is before us, in the absence of a formal record, that this case falls within the fifty-third section.

A *venire de novo* is asked for, in effect, because the panel of jurors was drafted from the jury list of the United Counties before the severance of the Union, upon a precept previously issued and addressed to the Sheriff of the United Counties, and because the panel of petit jurors returned to the Courts of Oyer and Terminer and General Gaol Delivery held for the County of York alone on the 10th January last, contains names of jurors, some living in the County of York, some in the County of Peel; or it may be thus stated:—The Court at which the prisoner was tried was a Court held in and for the County of York alone; the jurors could only be good and lawful men of that County; there was no precept for the summoning and returning a panel of jurors addressed to the Sheriff of that County; no panel was drafted from the jury list of that County; but all the jurors were drafted, summoned and returned, under the authority of a precept addressed to the Sheriff of the United Counties, and in obedience to the provisions of the statute applicable to such Counties as united.

I gather from the names of the six jurors stated in the motion paper, by referring to those names on the copy of the panel put in by the prisoner's counsel, that they were all residents of the County of York, and further, that had the precept been issued on or after the 1st January, 1867, and the Sheriff had returned the names (including these six) of fifty-four of the jurors whom he actually did return, the proceeding would have been so far strictly regular. I say *so far*, because the precept commands the summoning of eighty jurors.

The prisoner was tried by a jury *de medietate*. As to the six aliens, no objection has been suggested, nor to the six subjects, except those stated in the motion paper, all of which but one, relate to the form of the jury process, to its not being addressed to or executed by the Sheriff of the County of York, and to the return and proceedings under it. The one objection is of a somewhat speculative character, namely, that if eighty jurors of the County of York had been summoned, the prisoner might have had among the six

subjects some one or more different persons from those actually sworn. It is at least equally probable that had the precept been addressed to the Sheriff of York, and not of the United Counties, a less number of jurors would have been thought sufficient.

The objection involves a question of merits, in this sense—that every prisoner has a right to be tried by a jury of good and lawful men returned according to law to discharge that duty. Still the question is only as to the due observance of certain fixed rules. The jurors, as already noticed, were all from the proper County in and for which the Court was sitting. The same person who had been Sheriff of the United Counties continued by law to be Sheriff of the County of York after the severance. If a new precept had been delivered to him after the 1st January, he might legally and he probably would have returned the same jurors. Admitting that in strictness the panel should have been drafted from the jury list of York alone, this omission is, by the express words of the statute, no ground for impeaching the verdict. The trial itself was before the proper tribunal.

Possibly the array might have been quashed because the Sheriff's return to the Court, which sat only for the County of York, contained the names of jurors resident out of that County. See *Co. Lit.* 156 *a*. But no application of that character was made.

After full reflection, I think a writ of error is the proper mode to bring up the question now. The objection is to the jury process, and the return to it. If these proceedings can be upheld, and I give no opinion one way or the other, there is no excuse in my judgment for granting a new trial. I think it impossible to interfere with the verdict on the ground that it was contrary to law and evidence and the weight of evidence; and I do not see that any more general object, affecting the ends of public justice, requires that we should interpose by granting a rule on the strictly legal objections, which ought to appear on the face of a proper record. If these objections are valid the prisoner may obtain the full advantage of them on a writ of error, and if our opinion

should be adverse to him he can, as a matter of right, obtain the judgment of a higher tribunal. A writ of error will lie where the *venire facias* is addressed to improper parties : *Crane v. Holland*, (Cro. El. 138). See also *Willoughby v. Egerton*, (Cro. El. 853).

I by no means desire to intimate that I think the questions unimportant. They arise owing to the very special legislation for the separation of the Counties of York and Peel. If this separation had been left to the operation of the more carefully considered provisions of the Municipal Act, this difficulty would not have arisen.

I am therefore of opinion this rule should be refused.

HAGARTY, J.—The County of Peel was separated from its union with York from and after the 1st of January, 1867. In November preceding the usual precept was sent by the Judges to the Sheriff of the United Counties for the Winter Assizes, to commence in the City of Toronto on the 26th of December, and for the Counties on the 10th of January. The first Court was prior, the second subsequent to the severance of the Union, and the proclamation for separation was subsequent to the issuing of the precept.

This precept was, then, regular in form, duly issued, addressed to the proper officer, and under it the jurors were summoned from the body of the United Counties prior (as I understand) to the 1st of January.

On the 1st of January Peel is cut off; the Sheriff to whom the precept was addressed remains Sheriff of York. At the Court held on the 10th of January, the Sheriff returns his panel to that precept, but as a matter of fact none of the jurors summoned from the County of Peel attend, and all the jurors called on this trial were from York.

The indictment against the prisoner had been found at the preceding Assizes for York and Peel, and was then traversed by him, and he put himself upon the country, viz., to be tried by jurors selected from the body of the United Counties.

Section 52 of the Municipal Act declares that if on the dissolution of the Union there is pending an action, information, indictment or other judicial proceeding in which the venue is laid in a County of the Union, the Court, or a judge, &c., may order the venue to be changed by consent, or on hearing the parties, to the new County, &c.; and sec. 53 enacts that if not so changed all such actions, indictments, and other judicial proceedings shall be carried on and tried in the senior County.

The senior County, York, was therefore the proper place to try this indictment, as no change of venue was ordered.

26 Vic., ch. 4, sec. 2, declares that all public officers, after the separation, shall be the officers of the remaining County, as if originally appointed officers of the senior County. And sec. 1 declares that the separation shall not in any case or manner affect the office or duty of any public officer who continues a public officer of the senior County, further than by limiting such office, duty, power, &c., to the senior County.

On the construction of these statutes, it seems to me the plain intention of the Legislature to prevent as much as possible the interruption or avoidance of all legal proceedings pending at the date of the separation. A duly issued precept to the proper officer required him to summon jurors in the ordinary manner from the then United Counties, for a Court to be held after the 1st of January.

Now the venue in this indictment remained unchanged, and if the precept were lawful at its issue, I am very strongly of opinion that the separation of Peel at a day subsequent would, at the outside, merely have the effect (although I do not decide that it would) of withdrawing all the Peel jurors summoned under that precept from juries at the Assize in the senior County.

There was a proper precept to the Sheriff of York and Peel. It certainly was, in the words of the Act, "a judicial proceeding pending" at the time of the dissolution. The Sheriff remains by law from the 1st of January the Sheriff of York; a sufficient number of York jurors are returned by

him on his panel, out of whom the prisoner has his full challenges ; and I see no valid objection to such panel that it contains certain names of jurors summoned from the County of Peel. The objection that there was no precept to the Sheriff of York is, I think, fully answered by the Statutes, which provide that although he was Sheriff of York and Peel up to the 1st of January, he became or remained Sheriff of York alone from and after that day.

I see nothing in the objection that the number named in the precept did not attend. The prisoner had his full challenges.

As I think the application fails wholly on the merits, I need not decide whether counsel has selected the proper course to raise his objections.

In my view of the law it matters not in what shape the objections should be presented.

MORRISON, J., concurred.

Rule refused (a).

MACMARTIN V. THOMPSON.

Demurrer—Costs—Practice.

Defendant pleaded not guilty, and a special plea, to which the plaintiff demurred, and having carried the cause to trial before arguing the demurrer, defendant obtained a verdict on not guilty. The plaintiff then set down the demurrer for argument, in order to obtain the costs of it, but the Court, under the circumstances, refused to hear the case—holding that the plaintiff, having failed on the merits, could not put defendant to the costs of an argument, in order to get the costs of the demurrer.

Remarks as to the practice in such a case.

THE plaintiff in this case had set down a demurrer for argument, which the Court under the circumstances refused to hear.

(a) See *Irwin v. Grey*, L. R., 2 H. L., Eng. & Ir. App., 20.

Robert A. Harrison, for the plaintiff, urged that he was entitled to be heard, and to obtain judgment.

Cur. Adv. Vult.

The following judgment was afterwards delivered.

DRAPER, C. J.—This action was brought against the Sheriff for an escape, to which he pleaded not guilty, by statute, and a special plea.

The plaintiff joined issue on the first plea, and demurred to the second, and took the case down to trial before arguing the demurrer.

The jury found on the plea of not guilty for the defendant, who became thereby entitled to the *postea* and the general costs of the cause. The plaintiff moved against the verdict, but the Court refused to grant a rule to shew cause.

The plaintiff however set down the demurrer for argument, and it appeared to us we ought not to hear an argument for the mere purpose of giving the plaintiff the costs if he succeeded, for except upon this question, which could have no effect on the determination of the cause, the plaintiff had failed. We were however referred to the case of *Spencer v. Hamerton* (4 A. & E. 413), and to the 110th Section of the C. L. P. A. (Cons. Stat. U. C., Ch. 22 which enacts that “the costs of any issue, either of fact or of law, shall follow the finding or judgment on such issue,) and be adjudged to the successful party, whatever may be the result of the other issue or issues;” and to Sec. 316 of the last named Act, which provides that “in case judgment be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour the judgment is given shall also have judgment to recover his costs in that behalf.”

Spencer v. Hamerton is not applicable to the present case. There were only issues of fact in that case. The action was libel. On the general issue the defendant got a verdict, and he gave no evidence to support his special pleas of

justification, and the issues taken on these pleas were consequently found for the plaintiff, who was held entitled to the costs of those issues. The language of Lord Denman, C. J. in giving judgment in that case, is as strong as any thing I have met with to help the plaintiff's contention. In speaking of the statute of Anne he says "Reason and common sense dictate that, if the defendant has put the plaintiff to unnecessary expense by pleading that which turns out, either in law or in fact, to be unfounded, he should pay the plaintiff that expense, although he may be successful upon the general question." But there the question really was whether the plaintiff should recover all the costs he had been put to in preparing to meet the pleas of justification, or the costs of the pleadings only. All the plaintiff's costs were incurred before the event which determined the action in the defendant's favour, namely, the verdict on the general issue. The plaintiff could not anticipate that the defendant would not attempt to support his special pleas, and he had the finding of the jury in his favour.

Bentley v. Dawes (10 Ex. 347) is more like this case. There was a demurrer to the declaration, and pleas on which issue was joined. The plaintiff *got judgment on the demurrer*, and *afterwards* took the case down to trial, and on the trial a juror was withdrawn, which was treated by the Court as a determination of the cause. The Court held the plaintiff's case came within the language of the English Statute, 3 & 4 Wm. IV., ch. 42, similar to section 316 above quoted. This case could not be distinguished from the present in principle, if the plaintiff had obtained judgment on the demurrer before he tried the issues in fact.

But the present plaintiff, having failed entirely before the jury, desires to take further proceedings in order that he may get a judgment on his demurrer to a plea. Having irretrievably lost his cause, for the verdict as it stands shews he never had any cause of action, he desires to try an issue in law, in the hope that he may obtain a judgment upon that, and so get the costs of the demurrer itself, and of so much of the proceedings anterior to the verdict as relate thereto.

To my apprehension such a course would be oppressive and vexatious. If the defendant seeks his costs of the cause he must enter his judgment. If the undisposed of issue in law stands in his way, and he apprehends that he cannot sustain his plea, he must obtain leave to withdraw it, which will only be granted on proper terms. If he thinks he can sustain his plea, he has an interest in the final disposition of the cause that entitles him to set down the demurrer for argument; or if this issue creates no difficulty he may enter his judgment without disposing of it. I see no other alternative course, if he wishes to get the general costs of the cause. In the first or last the plaintiff may apply to have his costs of the demurrer taxed to him, and set off against the defendant's costs. If this cannot be granted it must be because there is no rule of law which entitles him to them, and I have seen no case or dictum which goes the length of saying that he can put the defendant to the further costs of an argument, in order to entitle him to the costs of demurring to a plea.

He has brought an action in which on the merits he has failed, and if he should be remediless to the extent of the costs occasioned by what, for the argument's sake, I assume to be a bad plea, this is, I think, a less injustice than to permit him to harrass the defendant further. He has neither a finding of the jury upon any issue of fact, nor judgment of the Court upon any issue in law, to entitle him to the right to costs given by the statute, and the conduct of the cause has passed out of his hands.

The defendant should, I think, have made application to strike the case out of the paper, instead of either compelling the Court to hear the demurrer argued or to take on themselves to refuse. The question has, however, arisen before, and the Court has, as it does now, refused to allow the party to proceed.

See *Hogg v. Graham*, 4 Taunt. 135; *Skinner v. Shoppee*, 6 Bing. N. C. 131; *Nicholson v. Dyson*, 11 M. & W. 545; *Scott v. De Richebourg*, 11 C. B. 447; *Bird v. Higginson*, 5 A. & E. 83; *Smith v. Hartley*, 11 C. B. 678.

BRITTON ET AL V. FISHER.

Promissory note—Endorsement when over due—Agreement to give time—Judgment non obstante.

Action by the endorsees against the maker of a note payable to J. W., by him endorsed to G. W., and by G. W. to plaintiffs. *Plea*, that J. W. endorsed the note to G. W. for safe keeping only, and not to be negotiated, and G. W. so received it; but after it fell due, and without J. W.'s authority, he endorsed it to the plaintiffs, who then had notice of the premises; and that while J. W. held it, and after it fell due, he, for value, gave time to defendant for payment until a day after the commencement of the suit. *Held*, after verdict, a good plea.

A valid agreement to give time is an equity which attaches to a bill as against a person taking it after maturity.

Semble, that there may be judgment non obstante where there is a general verdict for defendant, and the Plaintiff may then have his writ of enquiry to assess the damages.

ACTION on a promissory note made by defendant, payable to John Winter, or order, endorsed by him to George Winter, and by him to the plaintiffs.

Plea, that the payee endorsed the note to George Winter for safe keeping, for the payee's use and benefit, and not to be negotiated or delivered by George Winter to any person, and George Winter received said note on the terms aforesaid; and said George Winter, after the note fell due, contrary to said terms, and without the payee's authority, endorsed the note to the plaintiffs, who at the time of such endorsement to them had notice of the premises, and well knew George Winter had no power or authority to part with or negotiate the note. And while the payee was the holder, and after it fell due, said payee, for value, gave time to the maker for payment of the note until a day after the commencement of this suit, to wit, &c. Issue.

The case was tried at Kingston before Draper, C. J., when the jury, on a charge not objected to, found for defendant.

Britton obtained a rule *nisi*, in Michaelmas term, for a new trial, on the law and evidence, weight of evidence, and Judge's charge, or on grounds of surprise, and on affidavits; or for judgment *non obstante veredicto*.

Upon the merits, the Court refused to interfere, and it is considered unnecessary to report the case except as regards the last branch of the rule.

Sir *H. Smith*, Q.C., shewed cause during this term, citing *Kerr v. Straat*, 8 U. C. R. 82; *Bramah v. Roberts*, 1 Bing, N. C. 469; *Leaf v. Robson*, 13 M. & W. 653; *Easton v. Pratchett*, 3 Dowl. 472; *Gwynne v. Burnell*, 6 Bing. N. C. 469.

The plaintiff *Britton*, in person, supported the rule, and cited *Negelen v. Mitchell*, 7 M. W. 612; *Duke of Rutland v. Bagshaw*, 14 M. & W. 869; *Noel v. Rich*, 2 C. M. & R. 360; *Emmett v. Tottenham*, 8 Ex. 864; *Clarke v. Wilson*, 3 M. & W. 210; *Ross on Bills*, 251; *Byles on Bills*, 8th Ed., 111, 348, 402; *Webb v. Spicer*, 13 Q. B. 886; *Chitty on Bills*, 168.

HAGARTY, J., delivered the judgment of the Court.

As to the motion for judgment *non obstante*, the case of *Shephard v. Halls* (2 Dowl. 453) shews that it may be awarded where there is a general verdict for defendant on bad pleas, although no damages have been assessed. The Court awards the judgment, and the plaintiff may then have his writ of inquiry to assess damages.

But we think the plea here is a good bar, especially after verdict. The plaintiffs are alleged to have taken the note after it fell due, with full notice that it was endorsed to them by a person having no right so to do, and violating directly the trust on which he received it from the payee. It is then averred that while the payee was the holder, time was given by him to the maker for valuable consideration, which time had not expired when the suit was brought.

The plaintiffs are therefore in the double difficulty—first, taking it from a person with a known infirmity in his title, and without any right to endorse to them; and, secondly, even without notice thereof, they took it after due, and subject to all equities attaching to it.

A valid agreement to give time seems to us to be most certainly an equity attaching to the bill. It would be a valid defence to a suit by the then holder, the payee. It is not a collateral matter like a set-off, as in *Oulds v. Harrison* (10 Ex. 577). It is a matter directly affecting the right to sue on the note itself; a binding agreement by a

person authorized to enter into it, extending the time for payment of the amount, suspending any right of action thereon. *Parke, B.*, says:—"The endorsee of an overdue bill takes it subject to all the equities that attach to the bill itself in the hands of the holder when it was due; as, for instance, the payment or satisfaction of the bill itself to such holder." After explaining that a collateral matter like set-off was not an equity attaching on the bill, he adds, "unless, indeed, express notice was given by the party liable, and evidence of acquiescence in it, such as would amount to proof of an agreement to set off by both parties, which would be a satisfaction of this bill independently of the statutes of set-off."

The agreement here to extend the time must, we think, equally avail as against the plaintiffs in this case.

Rule discharged.

IN RE WILLIAMS AND THE GREAT WESTERN RAILWAY COMPANY.

Practice Court—Jurisdiction.

A rule *nisi* for a mandamus cannot be granted by the Practice Court.

In Easter Term, *Kerr* obtained a rule in the Practice Court, calling upon the Great Western Railway Company to shew cause why a mandamus should not issue, commanding them to appoint an arbitrator on their behalf to determine the sum to be paid to the applicants, in consequence of the construction of the railway on their land, &c.

In this term *Irving, Q.C.*, shewed cause, and *Kerr* supported the rule.

DRAPER, C. J.—We had gone through this case before it occurred to us that the rule had been granted by the Practice Court. As long ago as the case of *Sams v. The City of Toronto* (9 U. C. R. 181) it was held that such a proceeding

on an application to quash a by-law was irregular, and they discharged the rule. We find, since the argument, that the Court of Common Pleas have followed this decision in *Crysdale v. Moorman* (17 C. P. 218), an application for a mandamus, and discharged a similar rule with costs.

Rule discharged, with costs.

JACKSON V. KASSEL.

Maintenance of illegitimate child—Action for—Coverture of plaintiff—Form of affidavit—C. S. U. C., ch. 77—Evidence.

In an action brought for the maintenance of an illegitimate child, under Consol. Stat. U. C., chap. 77, sec. 4, it appeared that the plaintiff was a married woman, and that the affidavit filed by the mother stated that the defendant was the father of such child, not "really the father," as required by the act. *Held*, 1. That the plaintiff could not sue, for it must be presumed that the necessities furnished were her husband's; and that she must fail on never indebted, no plea in abatement being requisite. 2. That the omission in the affidavit was fatal. A nonsuit was therefore ordered.

The affidavit was produced from the office of the City Clerk, and purported to be sworn before the Police Magistrate of Toronto, where she resided. *Held*, sufficient evidence to go to the jury that it was deposited by her in the proper office.

It appeared probable from the statement of the mother that she was liable to the plaintiff for the demand sued for. *Held*, that the jury should have been told that if she was so liable her unsupported testimony would not sustain the action.

Remarks as to the practice of magistrates or commissioners taking unauthorised affidavits.

THIS action was brought under the 4th section of the Seduction Act (Cons. Stat. U. C., ch. 77), the plaintiff claiming to recover from the defendant for food, clothing, lodging and other necessities furnished to the illegitimate child of the defendant, begotten by him upon one Mary Marks.

The defendant pleaded—1st. Never indebted; 2nd. That the child was not his.

At the trial, before John Wilson, J., at the York and Peel assizes, in October, 1866, Mary Marks swore she was unmarried; that she had lived at defendant's house as a servant; that she was the mother of the child in question, and

that the defendant was the father; that the defendant's wife was her aunt; that the plaintiff kept the child two months, and expected to be paid by defendant; that she (the witness) could not get it boarded for less than \$6 a month; that the plaintiff got a room in witness's house and kept the child. The child appeared to have been born in August, 1864.

On cross-examination, she stated that she came from Germany by way of New York, and boarded there with a woman whose husband, the witness said, "is connected with *my husband*." She also said the plaintiff was a married woman; that she (the witness) took a house for three months, and let the plaintiff have a room, which she (the witness) furnished, for one dollar a month; that the plaintiff got the child, and the witness left it to her to keep.

An affidavit was produced at the trial from the files in the office of the City Clerk, which on the face of it purported to be sworn before Mr. Boomer, the late Police Magistrate for the City of Toronto, in which Mary Marks resided. This affidavit was sworn by Mary Marks, declaring that the defendant was the father of her child, but it did not follow the words of the statute in swearing that the defendant was "really" the father; the word really was omitted; nor did it appear who deposited the affidavit in the office of the Clerk; Mary Marks did not appear to have been asked. Neither this affidavit nor a copy were among the exhibits.

It was objected that the plaintiff was a married woman; that it was not shewn that the affidavit of affiliation was deposited by Mary Marks; that it was not filed in the proper office, nor was it stated to have been read and explained to her, she being illiterate; that the affidavit was not in the form given by the statute, the word "really" being omitted; that other testimony, besides that of Mary Marks, should have been adduced to prove that defendant was the father of the child. The objections were overruled, but leave was reserved to the defendant to move for a nonsuit upon any of them.

On the defence, it was proved that on the 6th April, 1864, Mary Marks, in consideration of \$150, executed a release, under seal, to the defendant, of all actions whatever, either on account of a charge of seduction of which she had accused him, or otherwise, declaring that she never had any claim whatsoever against defendant on account of the charge of seduction. On the same day she made an affidavit before a Justice and Alderman of the city, that defendant never had any connection with her at any time, and that the accusation made by her against him of having seduced her was entirely false.

The jury found for the plaintiff.

In Michaelmas term, *Robert A. Harrison* obtained a rule *nisi* to enter a nonsuit on the leave reserved.

In this term *M. C. Cameron*, Q. C., shewed cause. He cited, as to the objection of coverture, *Wallis v. Harrison*, 5 M. & W. 142; *Bendix v. Wakeman*, 12 M. & W. 97; *Milner v. Milnes*, 3 T. R. 631; Consol. Stat U. C., ch. 73.

As to the affidavit, and the evidence of its being deposited by the mother, Consol. Stat. U. C., ch. 54, sec. 376; Consol. Stat. U. C., ch. 77; *De Forrest v. Bunnell*, 15 U. C. R. 370; *Brodie v. Ruttan*, 16 U. C. R. 207; *Moyer v. Davidson*, 7 C. P. 521; *Bullen & Leake*, Prec. 408.

Robert A. Harrison, contra, cited, as to the first objection, *Kraemer v. Glass*, 10 C. P. 470; *Kirchhoffer v. Ross*, 11 C. P. 467. As to the affidavit, *Harding v. Knowlson*, 17 U. C. R. 564.

DRAPER, C. J., delivered the judgment of the Court.

We incline to the opinion that the first objection entitles the defendant to succeed. The case is distinguishable from *Dalton v. the Midland Counties Railway Co.* (13 C. B. 474) where the wife alone sued upon a cause of action (railway stock) which had been transferred to her in her own name, and the Court held she might sue in her own name, though subject to be defeated by a plea in abatement; nor is it governed by the case of *Bendix v. Wakeman*

(12 M. & W. 97) where the defendant covenanted with the plaintiff to pay her an annuity, she being at the time a married woman, and the defendant pleaded her coverture in bar. The Court there also held that it was the subject of a plea in abatement. In both these cases the right to sue would have survived to the wife in case of her husband's death.

Here the necessaries furnished must be deemed the husband's property, and that the plaintiff was dealing with it by his authority. The plea of never indebted denies liability to *her*. Proof that she supplied her husband's property to purposes which made the defendant liable to the value thereof, does not prove a liability to her. She could not even join in an action, any more than if her husband had kept a shop and she sold his goods in it. There is no proof that she furnished these things before she was married—Mary Marks only speaks of her as a married woman. If we were obliged to decide on this ground alone, we should, as at present advised, decide for the defendant.

We are of opinion there was evidence to go to the jury that the affidavit of affiliation was deposited in the proper office, and by Mary Marks. She appeared, presumably in the Police Office, and took the affidavit before the proper magistrate. The Clerk of the City Council is, unless some other person be appointed, Clerk of the Police Court. There was no suggestion that any other person had been appointed, and the affidavit is produced from the office of the City Clerk. If after making the affidavit she left it in the hands of the Clerk, that would, in our opinion, be evidence that she deposited it with him. We do not think it necessary to shew that she carried it into his office.

The omission of the word "really" from the affidavit is in our opinion a well founded objection. The 6th section of the Statute enacts that no action, such as the present, shall be sustained unless the mother, within a limited time, makes an affidavit declaring that the defendant in such an action "is really the father." It is, perhaps, difficult to point out what difference in substance there is between

swearing that A. is the father of a certain child, or that A. *really* is the father, &c. But it may have been thought that by requiring the woman to swear that A. really is the father, she would perceive she had no loop-hole for doubt or evasion; that she was not swearing to opinion or belief, but to a fact which she certainly knew. If she was self-convicted of such an immoral life that she had not this certainty, the form of words she was required to use might prevent her swearing at all. However, whatever be the reason, the language of the act is plain and also peremptory, and we are not prepared to hold that the oath she has taken is the oath which the statute requires.

We should gather from her own statement that Mary Marks was legally responsible to the plaintiff for the demand in this action. The only thing on which to ground a contrary conclusion is her statement that the plaintiff expected to be paid by the defendant. Possibly, perhaps not improbably, according to the evidence, Mary Marks having got \$150 from the defendant for releasing what was not vested in her, any right to sue for her own seduction, may have agreed with the plaintiff to assist her in this mode of compelling the defendant to support the child, or to pay her a further sum to be indemnified against any such demand for the future—a point not covered by the release. Be this as it may, the question of her liability to the plaintiff was for the jury, and they should have been told that if she was so liable her unsupported testimony would not sustain the action. The contradiction between her affidavit, made before Alderman Strachan, and the affidavit of affiliation, could not, on this question being submitted, have escaped notice.

On the first and third objections, we are of opinion there should be a nonsuit.

HAGARTY, J., with reference to the affidavits put in for the defence, remarked upon the reprehensible practice of magistrates administering extra-judicial oaths.

DRAPER, C. J.—There is a strong dictum in one of the

late editions of Burn's Justice, that a magistrate taking an affidavit without authority is guilty of a misdemeanor. I have often called attention to this, and more often to the practice of commissioners taking affidavits in matters not in the Court. There is a case reported, though I cannot put my hand on it, of a criminal information brought for this.

Rule absolute.

IN RE THE SHERIFF OF THE CITY OF TORONTO AND THE
RECORDER OF THE CITY OF TORONTO.

County of the City of Toronto—Right of Sheriff to select and summon Jurors
—24 Vic., ch. 53.

Held, that since the Act separating the City of Toronto from the United Counties of York and Peel, 24 Vic., ch. 53, the Sheriff of the County of the City of Toronto, not the High Bailiff, is entitled to be selector of, and to ballot for and summon, the jurors for Courts held in the City. *Morrison, J.*, doubting as to the first point.

Gwynne, Q. C., obtained a rule calling upon the Recorder of the City of Toronto to shew cause why a writ of Mandamus should not issue, commanding the Recorder to swear in the Sheriff, in his capacity as Sheriff of the County of the City of Toronto, as a selector of Jurors to serve in the Recorder's Court, and also commanding the said Recorder to issue his precept addressed to the said Sheriff, directing him to ballot for and summon the panel of grand and petit jurors, to serve as jurors in the said Recorder's Court.

The application was founded on an affidavit of the Sheriff, stating that he is Sheriff of the County of the City of Toronto: that he tendered and offered himself as a selector of jurors, and that he demanded from the Recorder a precept for striking and summoning panels of jurors for the Recorder's Court, and that the Recorder declined to do so; and that the High Bailiff performed all the duties referred to.

Burns shewed cause, and *Gwynne*, Q. C., supported the rule.

The Statutes bearing upon the question are referred to in the judgments.

MORRISON, J.—It is quite clear that before the passing of the 24 Vic., ch. 53, the Act separating the City of Toronto from the United Counties of York and Peel, the High Bailiff was one of the persons appointed for the purpose of preparing and selecting the jury lists from the jurors' rolls; for by sub-sec. 3, of the 132nd section of the Jury Act, Consol. Stat. U. C., ch. 31, it is enacted that the Recorder's Court, the Recorder of the city, or the Chairman or other presiding member thereof, the Mayor of the city, and the Clerk of the Recorder's Court for the time being, and the *High Bailiff*, shall respectively perform the like duties in respect of jurors' books, and the preparing and selecting of the jury lists from the jurors' rolls, as are prescribed to the selectors of jurors from jurors' rolls for counties.

It is contended by the applicant that under the provisions of the Act separating the city from the united counties, it is now his right as Sheriff to perform those duties in the place of the High Bailiff.

By section 5 of that Act it is enacted that the jurors (that is, for all the counties) shall be selected and summoned for the united counties and for the city respectively, as for different counties; and by the eighth section, the City of Toronto shall be deemed a county for all matters and purposes in the Act mentioned, connected with the administration of justice; and by the tenth section it is provided, that the Sheriff of the County of York shall be Sheriff of the City of Toronto, being such county, and as such Sheriff shall have and exercise in the said city, in respect of the same and of the gaol therein, and in all other respects, such and the same rights, powers and privileges as appertain to and are exercised by the Sheriff of the said united counties.

By a reference to the 51st section of the Jurors' Act, we find that the Sheriff of a county is *ex-officio* one of the

selectors of jurors within his county, that body being composed of certain county officers and others mentioned in the section.

Considering the objects of the 51st section and the third sub-section of sect. 133, which latter section applies to every city in which there is a Recorder's Court, I think it was the intention of the Legislature that the respective selectors for counties and cities having a Recorder's Court, should be composed of the officials mentioned in the respective sections referred to—the Sheriff being one of the body of selectors for counties proper, and the High Bailiff one of the body for cities. Such being the case, unless we see that the Legislature expressly altered the constitution of the selectors, we ought not to interfere.

The selecting of jurors, it may be said, as it was argued, is one of the rights and powers which appertain to and are exercised by a Sheriff of a county; but it is only, I think, a right or power to be exercised in conjunction with the other official persons who with the Sheriff constitute the body of selectors for a county. I have considerable doubts that it is a right or duty of the Sheriff, within the meaning of the 10th section of the separating act; but as the learned Chief Justice and my brother Hagarty entertain the opinion that it is, I do not feel strong enough to dissent from their judgment.

With respect to the second branch of the rule, from the best construction I can put upon the sections of the statutes bearing on the question, I think our judgment should be for the applicant.

The 4th, 5th, and 6th sub-sections of section 132 of the Jurors' Act provide that all the duties prescribed to the Sheriff of counties, in respect of jurors, and as to drafting, striking, and summoning jurors, shall be performed by and required of the High Bailiff of cities. Such was the law previous to the act separating the city. We have now to consider whether the provisions of that act, especially sections five, eight and ten, already quoted, devolve on the Sheriff the duty of balloting for and summoning panels of

jurors for the Recorder's Court, which under another name is the Court of Quarter Sessions for the county of the City of Toronto.

The first section of the separating act provides, that after the 1st day of July (1861), there shall be separate sittings for the united counties and for the City of Toronto, of every Court for the trial of causes by a jury; and by the 5th section, jurors shall be selected and summoned for the city as for a county; and the 10th section, already stated, declares in wide terms that the Sheriff of the county of the City of Toronto shall have and exercise in the said city the same rights powers and privileges as appertain to and are exercised by the Sheriff of the then united counties. One of these rights is that of balloting for and summoning the panel of grand and petit jurors for all the various Courts.

By the 379th section of the Municipal Act, chap. 54 of the Consolidated Statutes, and which section is re-enacted as section 377 of the Municipal Act of last session, the High Bailiff of a city, not made a separate county for all purposes, shall ballot for and summon the jurors (for the Recorder's Court) under a precept signed by the Recorder, &c., in the manner appointed by the laws relating to jurors. This provision evidently contemplates that the High Bailiff of a city set apart for all purposes, which is in effect the position of the City of Toronto, would not be the officer to perform those duties.

It is not without hesitation that I have arrived at the conclusion that I have come to, as it is difficult to reconcile the language used in the various sections of the three statutes; but after the best consideration, I take it that the effect of the 10th section of the separating act is, that the duty of summoning jurors for all the Courts in the county of the city devolves on the Sheriff thereof, and that it is the duty of the Recorder to issue his precept to him for that purpose; and I think that such was the intention of the Legislature.

It is to be regretted that while the Legislature had under

consideration our whole municipal system last session, that all doubt on a matter of this nature had not been removed.

HAGARTY, J.—It was conceded in argument that the application depended mainly on the point whether the city was now a separate county for all purposes.

I had occasion to consider the effect of the Statutes in *In re Macnab and Daly* (22 U. C. R. 171). The Court said "As we read this act" (of separation) "we cannot see that it was the intention of the Legislature to continue any connection between the old counties of York and Peel and the new county of the city. Again, "We find machinery for working the jury law similar to if not precisely identical with that provided for the counties, and then a declaration from the Legislature that the selecting and summoning of jurors shall be in the city as in a different county."

The separating act says emphatically (sec. 8) "The City of Toronto shall be deemed a county for all matters and purposes in this act mentioned, connected with the administration of justice."

The selecting and summoning of jurors is one of the purposes mentioned in the act; and sec. 5 directs those duties to be performed for the united counties and city respectively "as for different counties;" and section 10 directs that the Sheriff shall have and exercise in the city, in respect of the same and of the gaol therein, *and in all other respects*, the same rights, powers and privileges as appertain to and are exercised by the Sheriff of the united counties.

I am of opinion that the City of Toronto is a county "for all purposes" in the contemplation of the Statutes: that the apparent connections suggested by Mr. Burns as still existing, do not disprove such complete separation, but are allowed notwithstanding it.

As my brother Morrison remarks, it is very significant that the Legislature in the new Municipal Act of last session, aware, as we must assume, of the previous separation of the city, repeated in section 377 the provision for the High Bailiff balloting and summoning jurors in a city not "made a separate county for all purposes."

I agree in thinking the rule must be absolute as to balloting and summoning the jurors.

I feel a difficulty in distinguishing between the two branches of the application, as my brother Morrison has done. He considers the Sheriff not to be entitled to act as a selector.

The separating act says (section 5), "The jurors shall be selected and summoned for the united counties and for the city respectively, as for different counties."

The Jury Act, which speaks of *all* cities having a Recorder's Court (without any distinction as to being wholly separated or not) appoints the Recorder, the Mayor, or the Clerk of the Court, and the High Bailiff to perform the duties of jury selectors—Section 132.

In the county the like duties are done by the Chairman of Quarter Sessions, the Clerk of the Peace, the Warden, the Treasurer, the Reeves present, and the Sheriff—Sec. 51.

It may not be impossible to reconcile the different descriptions of selectors by the 9th section of the Separating Act—"The judicial and executive functionaries and all other officers connected with the administration of justice in the city, shall be the judicial and executive functionaries and officers *discharging the like offices and duties* in the united counties."

The Recorder answers to the Chairman of Quarter Sessions, the Mayor to the Warden, the City Clerk to the Clerk of the Peace, the High Bailiff to the Sheriff. The Reeves present have no counterparts in the city; and the Chamberlain, who would represent the County Treasurer, is not named as a city selector. But those actually named for the city have their counterparts—namely, Recorder, Mayor, Clerk, and High Bailiff.

If the Sheriff be the proper person to do the work, or to join in doing the work in a county, and if the Separating Act, (section 5) passed after the Jury Act, expressly declares the selecting and summoning of jurors to be in the city as for a county, it is perhaps not easy to see why the Sheriff should not also do this work for the county of the city.

I am not satisfied that the section 132 of the jury act, providing for selections in cities, especially if read with the sections from the Municipal Act already noticed, does not refer altogether to cities *not* separated for all purposes.

The first sub-section of this section 132 clearly refers to a city *embraced within the limits of a county*; and sub-section 3, under which the selectors are specially appointed, speaks of "the Recorder of such city," Mayor, Clerk, High Bailiff, &c., forming the selectors; and sub-section 4 says, "All other duties which are by this act prescribed to the Sheriffs of counties, in respect of jurors, whether grand or petit, within their respective counties, shall, as respects grand or petit juries *for the Courts of any such cities*, be performed by and required of the High Bailiff," &c.

So these sub-sections would all seem to refer to the city mentioned in the first sub-section, namely, a city embraced within the limits of a county.

I do not see my way to carry out the enactments of the separating act, except by giving the Sheriff the performance of all the duties connected with the selecting and summoning of the jurors.

DRAPER, C. J., concurred with HAGARTY, J.

Rule absolute.

THE UNITED BOARD OF GRAMMAR AND COMMON SCHOOL
TRUSTEES OF THE VILLAGE OF TRENTON, AND THE
CORPORATION OF THE VILLAGE OF TRENTON.

*Schools—Union of Grammar and Common Schools—C. S. U. C., ch. 63,
sec. 25, sub-sec. 7—Ch. 64, sec. 79, sub-sec. 9.*

“The United Board of Grammar and Common School Trustees of the Village of Trenton,” applied for a mandamus to the Corporation of Trenton to levy a sum of money required by them for Grammar School purposes, as mentioned in the estimate; supporting the application by an affidavit of their Secretary, who stated that the Trustees of the Village of Trenton County Grammar School had united with the Board of School Trustees of the Village of Trenton, and the same became and had ever since been the United Board of Grammar and Common School Trustees of the Village.

Held, that such Union of the two Boards of Trustees was not authorised by the Statutes—Consol. Stat. U. C., ch. 63, sec. 25, sub-sec. 7, and ch. 64, sec. 79, sub-sec. 9; and the application was therefore refused.

In last Michaelmas term, *D. B. Read*, Q. C., obtained a rule *nisi*, calling on the corporation of the Village of Trenton to shew cause why a peremptory writ of mandamus should not be issued, requiring the said corporation to provide for the united board of grammar and common school trustees, for the Village of Trenton, the sum of \$500, as contained in the estimates of the said united board, dated the 25th September, 1866, and referred to in the affidavits filed.

The application was based on an affidavit of the secretary of “The United Board of Grammar and Common School Trustees of the Village of Trenton,” who stated that before the 26th of September last, “the Trustees of the incorporated Village of Trenton County Grammar School” united with “The Board of School Trustees of the Village of Trenton,” in the county of Hastings, and the same became and have had since been the United Board of Grammar and Common School Trustees of the Village of Trenton, and that such union took place about the month of June or July last; that on the 26th of September last the estimates, a copy of which was attached to the affidavit, were passed by the said united board and under the seal thereof, and that he on the same day left the original estimates with the Clerk of the

corporation of the Village of Trenton ; that the corporation refused to provide for the grammar school purposes in said estimates mentioned, and still refuse so to do ; that on the 5th day of November last, the said corporation passed resolutions, a copy of which was annexed to the affidavit.

The estimates were as follows :—" The following are the estimates of the United Board of Grammar and Common School Trustees of the Village of Trenton for the current year, 1866 and 1867 :

For Grammar School purposes :

For paying part of the Salary of Teacher	\$300 00
For building Grammar School House, repairing, furnishing, warming, &c.....	200 00
	\$500 00

For Common School purposes :

For paying part of the salaries of teachers	\$700 00
Warming, furnishing and keeping in order the school houses, and their appendages, &c.....	100 00
For all other necessary expenses connected with the schools, &c.	100 00
	\$1400 00

The United Board of Grammar and Common School Trustees of the Village of Trenton desire the Municipal Council of said village to provide the above sums for the said Trustees, according to law.

September 26, 1866.

[L.S.]

(Signed), J. MARSH,

Chairman,

U. B. G. and C. S. Trenton."

The resolutions referred to were as follows :

Council Room, November 5th, 1866. (Then the names of the four councillors present.)

Moved by, &c., that a By-law be passed levying 15½ cents on the dollar, for common school purposes.—Carried.

Moved by, &c., that a By-law be passed levying 6 cents

on the dollar for grammar school purposes.—Yeas, 2; Nays, 2. Res. lost.

During this term *M. C. Cameron*, Q. C., shewed cause, and *Read*, Q. C., supported the rule.

Consol. Stat. U. C., ch. 63, secs. 16, 20, 24, 25, sub-sec. 7; ch. 64, sec. 27, sub-secs. 4, 7, 12; sec. 77, 79, sub-secs. 9, 11, 18; *the Trustees of the Weston Grammar School and the Corporation of York and Peel*, 10 U. C. L. J. 42; *The School Trustees of Toronto and the Corporation of Toronto*, 20 U. C. R. 302; *School Trustees of Sandwich and Corporation of Sandwich*, 23 U. C. R. 642, were cited on the argument.

MORRISON, J., delivered the judgment of the Court.

It was contended on the part of the applicants that they were a joint board within the provisions of the 7th sub-section of sec. 25, Consol. Stat. U. C., ch. 63.

That sub-section authorises the board of trustees of a grammar school “to employ, in concurrence with the trustees of the school section, or the board of common school trustees in the township, village,” &c., “in which such grammar school may be situate, such means as they may deem expedient for uniting one or more of the common schools of such village,” &c., “or departments of them, with such grammar school; but no such union shall take place without ample provision being made for giving instruction to the pupils in the elementary branches, by duly qualified English teachers; and these schools thus united shall be under the management of a joint board of grammar and common school trustees, who shall consist of and have the powers of the trustees of both the common and grammar schools; but when the trustees of the common school exceed six in number, six only of their number, to be by them selected, shall be the common school portion of such joint board.”

Sub-section 9 of sec. 79 of the Upper Canada Common School Act (Consol. Stat. U. C., ch. 64) authorises the board of school trustees “to adopt, at their discretion, such measures as they judge expedient, in concurrence with the trustees of the county grammar school, for uniting one or

more of the common schools of the city, town or village, with such grammar school."

It was objected that the statutes did not authorise the * union of these two boards of trustees into a united board ; that it was not shewn that the provisions of the two sub-sections above mentioned were complied with, or that the schools referred to were united ; and it was argued that before the joint board were entitled to call upon the corporation to provide the amount of the estimates sought to be enforced by mandamus, the applicants must shew that a union of the schools, or some of them, had taken place under sub-section seven above quoted.

It certainly does not appear from the affidavit or papers filed that one or more of the common schools of the village of Trenton and the grammar school of that village are united. What is shewn is, that the trustees of the grammar school of that village united with the board of school trustees, and became the united board of that village, in what way and for what purpose does not appear.

What the school acts authorise is the union, upon certain conditions, of the grammar school and one or more common schools, not of the two sets of trustees as trustees, and that such schools, when united, shall be under the management of a joint board of the trustees of the grammar school and the trustees of the common schools, the latter not exceeding six in number. There is no affidavit or proof of the union of such schools, or that the union of the grammar school was with one or more or all the common schools of Trenton.

We think the objections taken are fatal to the application.

It was contended on the part of the applicants, that if their board was not properly constituted, the onus was on the corporation to shew the defect, as the corporation had adopted the arrangement ; but we see nothing to warrant such an allegation. It does not appear by affidavit that the corporation did do so. Two resolutions of the council are shewn, one adopted for levying so much on the dollar for common school purposes, without stating any sum or other-

wise connecting the levy with the estimates sought to be enforced; for all that appears, the resolution refers to common school purposes other than those mentioned in the estimates of the applicants, and no affidavit is filed shewing to what that resolution refers.

For these reasons, we are of opinion that the rule should be discharged.

Rule discharged.

HERR V. DOUGLAS.

Practice—Delay in taking out and serving order.

Defendant signed judgment of *non pros* against a plaintiff in ejectment, for not proceeding to trial in accordance with a twenty days' notice given by defendant. The plaintiff, on the 3rd April, 1866, obtained a summons to set aside such judgment, which on the 16th June was made absolute, but the order was not taken out until the 22nd October following, nor served until the 27th. *Held*, that the order was waived by such delay, and must be set aside, whether the judgment was void or only irregular.

In Michaelmas term, *Robert A. Harrison* obtained a rule calling on the plaintiff to shew cause why the order of Mr. Justice Hagarty, made in this cause, and dated 16th June, 1866, should not be set aside, and the summons therefor be discharged. The summons, dated 3rd April, 1866, was to set aside, with costs, the judgment entered in this cause on the 26th of March, 1866, against the plaintiff, for not proceeding to trial, and the execution issued thereon.

The grounds of objection taken in the rule were: 1. That the summons did not attack the judgment of *non pros* entered in this cause on any ground of irregularity. 2. That said summons did not specify any objection intended to be insisted upon in the argument as ground of irregularity. 3. That said summons, except as to an alleged ground of irregularity not specified in the summons, was in effect discharged. 4. That said summons was made absolute and said order granted on a misapprehension of facts, in this, that the learned Judge who made it supposed the commission day for the last spring assizes of the united

counties of Huron and Bruce was the 30th March, 1866, whereas it was the 20th March, 1866, and said judgment instead of being entered before the commission day of said assizes, as supposed by said learned Judge, was not in truth entered till after the commission day. 5. That said order, even if properly made, was lapsed and abandoned by reason of the delay and laches of the plaintiff in issuing and serving same. 6. That defendant has been prejudiced by such laches and delay.

This was an action of ejectment, the summons in which issued on the 23rd September, 1865, and was served on the 25th of the same month. The venue was in the county of Huron, and the fall assizes for that county began on the 10th October following, and the defendant was only bound to appear within sixteen days after the service, and he appeared on the 15th or 16th of October. The next assizes in that county began on the 20th March, 1866. On the 26th February, 1866, a notice was served on the plaintiff to bring the issue on to be tried at the assizes next after twenty days after service of that notice. The plaintiff did not proceed to trial at the assizes held on the 20th March, and on the 26th March the defendant signed judgment against him and taxed his costs. Upon that the summons of the 3rd April, 1866, was taken out, and the order of the 16th June was made. It was not, however, taken out until the 22nd October following, nor served until the 27th.

Robert A. Harrison, in support of the rule, cited *Judkins v. Atherton*, 3 E. & B. 987; *Sedgwick v. Allerton*, 7 East 542; *Edensor v. Hoffman*, 2 C. & J. 140; *Charge v. Farhall*, 4 B. & C. 865; *Kenney v. Hutchinson*, 6 M. & W. 135; *Normanby v. Jones*, 3 D. & L. 143; *Wilson v. Hunt*, 1 Chy. Rep. 647; *Mulholland v. Corporation of Grey*, 23 U. C. R. 517; Ch. Arch. Prac., 12th Ed., 1470.

Affidavits were filed, on moving this rule, by the agent of the defendant's attorney, that on shewing cause to the summons in Chambers, it was contended that it should not be made absolute on any ground of irregularity, as no ground

of irregularity was specified therein, and that such objection was not waived by enlargement.

Gwynne, Q. C., during this term shewed cause.

DRAPER, C. J.—It appears to me that without an entire disregard of the decisions on this point, of the necessity of promptly taking out and serving an order which may prevent delay or otherwise prejudicially affect the proceedings of the opposite party, we cannot, after a delay from the 16th June to the 27th of October following, treat this order as one by which the defendant should be bound. The delay is a waiver of the order, and the plaintiff having waived it cannot now treat it as one to the benefit of which he has any claim or title; and as it prevents the defendant from enforcing his judgment it ought to be set aside.

I desire to add that my conclusion rests exclusively on the ground of waiver. I have felt it unnecessary to give any consideration to the grounds on which the order was granted; probably there is no room for doubt upon them.

The cases cited by Mr. Harrison fully warrant this decision, and even conceding that the judgment set aside by that order was void, and not merely irregular, it would not alter my view as to this application.

HAGARTY, J.—I agree that the laches of the plaintiff in taking out the order is fatal, and he must be held to have abandoned it, and that my order must be rescinded.

There should be no misunderstanding as to the legal point, which seems so very plain.

The first Court at which the plaintiff could have brought down the case for trial was the spring assizes held on the 20th March. Until he had made default at that Court the defendant had no right to give him the twenty days' notice.

The Ejectment Act, Consol. Stat. U. C., ch. 27, sec. 44, says: If the claimant after appearance entered without going to trial, allows to elapse the time fixed by the practice of the Court for going to trial in ordinary cases after issue joined, the defendant may give twenty days' notice to the claimant to proceed to trial, &c.

Conceding that as the issue was joined before Michaelmas term, the plaintiff was bound to go to trial at the next spring assizes, he was clearly not in default until a neglect to try in the spring, and defendant until the default had no right whatever to give him the twenty days' notice. In sec. 227 of the C. L. P. Act, the same words are used; upon default the defendant may give the twenty days notice.

By this laches I fear a very great injustice is successfully practiced on this plaintiff.

I regret that the applicant here thought it either necessary or proper to file such an affidavit as he did of what took place in Chambers.

It is quite true that an objection was taken to the form of the summons on its return, but the Judge was not asked to decide the case thereon; but after an argument on the merits, as it was sought to make the attorney personally responsible for costs, the defendant pressed for an enlargement to enable him to get the attorney's affidavit. This was objected to by the plaintiff, but was finally allowed, as the endorsement signed by me on the summons shews:—

“Enlarged peremptorily to Saturday, 21st inst., at request of defendant's attorney, for him to file his own affidavit.”

It is not pretended in the affidavit filed that at the final argument this technical objection was urged, and under the circumstances I have no doubt whatever it was considered and treated by all parties as waived.

The written judgment given by me a few days after, says, after mentioning the peremptory enlargement: “No objection was made then, that I remember, as to any ground of objection not being mentioned in the summons. The contention seemed chiefly on the merits, as to an alleged understanding.”

We all know how Chamber business is necessarily conducted, and technical objections disposed of by waiver or otherwise on enlargements from time to time at the request of either party.

If the course adopted on this application become general,

it would be necessary that special note shall always be made as to these minute matters in the multifarious business of Chambers.

MORRISON, J., concurred.

Rule absolute.

JORDAN V. GILDERSLEEVE.

Practice—Shewing cause to lapsed rule.

A rule *nisi* to vary an order of *Nisi Prius* was taken out in Easter Term, but allowed to lapse, no rule to enlarge it until Trinity Term having been obtained. In that term, however, the plaintiff's counsel shewed cause against it, and no one appearing on the other side, it was discharged with costs. *Held*, that as it had lapsed the shewing cause was nugatory, and the rule discharging it was set aside as having been improvidently issued; but the error being in part that of the court no costs were given.

During last term *McBride* obtained a rule calling upon the plaintiff to shew cause why the rule made in this cause in Michaelmas term last, discharging a rule granted in the Easter term preceding on the application of the defendant Gildersleeve, should not be rescinded for irregularity, on the ground that the last mentioned rule had lapsed before the rule discharging the same was moved for; and also why the rule made in the Practice Court in this cause in Michaelmas term last, making a certain paper writing called an order of *Nisi Prius* a rule of Court, should not be rescinded and set aside, on the ground that the paper writing was not such an order as could be made a rule of the Practice Court.

It appeared that in Easter term last a rule *nisi* was taken out to vary this order of *Nisi Prius*, (which order directed the postponement of the trial on payment of costs by defendants,) by relieving Gildersleeve from payment of costs—upon the ground that the action was ejectment; that defendant Campbell was in possession of two-thirds of the premises as agent for Gildersleeve, and of one-third as tenant of defendant Caroline Smith; and that defendant Gildersleeve was

ready and willing to proceed to trial. It was not shewn whether his defence was limited to two-thirds or was general. After this rule was issued and served, it was ascertained that the order of *Nisi Prius* had not been drawn up, and the rule to vary it was allowed to lapse. (Neither this rule nor any copy of it were brought before the Court on making the present application.) No rule enlarging it until Trinity term was taken out, but in that term the plaintiff's counsel shewed cause against it, and no one appearing to support it, it was discharged with costs.

It further appeared that in Michaelmas term last the plaintiff obtained a rule in the Practice Court making the order of *Nisi Prius* a rule of Court.

To this rule *Sir H. Smith*, Q. C., shewed cause during this term. He put in an affidavit, to which was annexed a copy of the rule obtained in Easter term by defendant Gildersleeve. It was sworn that the rule and the affidavits upon which it was moved were wrongly entitled; and according to the present rule that was so, for the name of the defendant Campbell was omitted in the rule of Easter term. He cited Ch. Arch. Prac., 11th Ed., 1571; *Leggo v. Young*, 17 C. B. 549, S. C., 25 L. J. C. P. 176.

McBride supported the rule, citing *Scott v. Marshall*, 2 C. & J. 60; *Smith v. Collier*, 3 Dowl. 100; *Hargrave v. Holden*, Ib. 176; *Rowbottom v. Ralphs*, 6 Dowl. 291; *Sheriff v. Gresley*, 5 N. & M. 493; *Giraud v. Austen*, 1 Dowl. N. S. 703; *Teggin v. Langford*, 10 M. & W. 556; *Batty v. Marriott*, 5 C. B. 420.

DRAPER, C. J. delivered the judgment of the Court.

If the rule was not lapsed when cause was shewn to it in Trinity term, it would most probably have been discharged for irregularity, with costs, as in fact was done, though on the ground that the defendant did not support it.

We do not understand what is the objection to the order of *Nisi Prius* being made a rule of the Practice Court, and see no sufficient nor indeed any reason to interfere with it.

As to the other part of the motion, it does not appear

when the rule granted in Easter term was served. If the service was delayed so that the plaintiff's counsel could not by right be heard during that term, it might make a difference, though there seems to have been a fatal irregularity (though amendable upon proper materials) in the title of the rule, and, as stated on affidavit, in the title of the affidavits on which it was moved. On the merits also a difficulty would probably have arisen, as it does not appear whether defendant Gildersleeve limited and so separated his defence from that of Caroline Smith.

The only points involved in the rule are, 1st. Had the rule of Easter term lapsed, so that the plaintiff's counsel had no *locus standi* to shew cause against it, or to move to discharge it.

We are all clear that the rule had lapsed and was at an end, and that the proceeding to shew cause against it was wholly nugatory; that the discharging it was improvidently done, and cannot be allowed to stand; and this rule, so far, must be made absolute. Under the circumstances, the error being in part that of the Court, we cannot give costs.

Rule accordingly.

OFFAY V. OFFAY.

Absconding Debtor—Practice—C. S. U. C., ch. 25.

The plaintiff had sued out an attachment against defendant as an absconding debtor, and went down to the County Court to prove his claim, upon a record shewing interlocutory judgment signed for want of a plea. Defendant applied to have a plea of never indebted put on the record, on the ground that such plea had been filed before signing the judgment.

Held, affirming the judgment of the County Court, that the application was rightly refused, for defendant should have moved against the judgment if irregular; and he had no right to plead until he had put in special bail.

Held, also—reversing such judgment, *Draper*, C.J., doubting—that although defendant had not put in special bail, his counsel should have been allowed to cross-examine the plaintiff's witness, and give evidence in mitigation of damages.

APPEAL from the County Court of the County of Huron.

Moss, for the appellant, cited *Lavis v. Baker*, 13 C. P. 506.

C. Robinson, Q. C., contra, cited *Abley v. Dale*, 10 C. B. 62; *Re Hamersmith Rent Charge*, 4 Ex. 87; *Hastings v. Earnest*, 7 U. C. R. 520.

The facts of the case, the grounds of appeal, and the sections of the statute referred to, are fully stated in the judgments.

DRAPER, C. J.—The plaintiff sued out an attachment against the defendant as an absconding debtor. It is to be assumed that the Sheriff found effects which he seized, otherwise the action could not, as I apprehend, have gone on.

The defendant did not enter special bail, but when the cause came before a jury at the County Court sittings in December last, counsel appeared in his name, and applied to have a plea of never indebted, which had been filed in the Clerk's office, put upon the record, and objected that the judgment by *nil dicit* was not signed till after this plea had been filed. The Court (properly in my opinion) refused the application, on the ground that the record shewed interlocutory judgment had been signed, and that was neither the time nor place to set it aside if irregular.

The defendant's counsel then desired to cross-examine the witness for the plaintiff, and to call witnesses on behalf of the defendant, in mitigation of damages. The only evidence offered was that of the plaintiff's attorney, who swore that the plaintiff and defendant met at his office: that the then Judge of the County Court was with them, trying to bring them to a settlement; that the accounts were then adjusted, and the defendant agreed to pay the plaintiff \$142, which is unpaid. The defendant's counsel was not permitted to cross-examine this witness nor to call witnesses. The jury gave the plaintiff a verdict.

In the January term following, the Judge of the County Court granted a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial granted, which rule was discharged with costs. This decision is appealed against, because

1. The plea filed and served before interlocutory judgment ought to have been added to the record before the trial.

2. That the plaintiff not having complied with the terms of the order, dated 24th October, 1866, or with the practice, in filing an interlocutory judgment, and no such judgment ever having been filed or entered, and no date of any such entry appearing on the record, the trial should not have been proceeded with, and a new trial should have been granted.

3. That the defendant should have been permitted to cross-examine plaintiff's witnesses, and to call witnesses in mitigation of damages, and to address the jury.

I fully agree with the judgment of the Court below as to the first and second objections. The 11th section of the Absconding Debtors Act, coupled with the preceding provisions, satisfies me that after the attachment is issued and executed the absconding debtor must put in special bail before he can be let in to plead. The entry of an appearance was a nullity, as well as the filing the plea. Nor was it open to him to raise objections at the time those objections were urged, to the regularity of the issuing of the writ of attachment, on the ground of non-payment of costs of prior proceedings.

I have felt more doubt whether the defendant had not a right to be heard in mitigation of damages before the Judge. In ordinary cases a defendant who suffers judgment by default has this right. There, however, he simply acknowledges generally a cause of action such as the declaration discloses, and may contest the amount which the plaintiff claims for debt or damages ; he has done nothing by which he, as it were, declines or refuses to submit to the jurisdiction of the Court. According to the entry on the record, he comes and defends, but says nothing in bar. The record in this case follows that form, and as appears to me erroneously. The truth, according to the facts shewn, is the other way, and it would have been consistent with the truth

to have stated to the effect that the defendant had not put in special bail according to the exigency of the said writ of attachment sued out against him, but had made default, wherefore the plaintiff ought to have judgment and execution, but because it is unknown, &c.

The defendant, upon this record, must be taken to have departed from Upper Canada with intent to defraud his creditors, being at the time of his departure possessed to his own use and benefit of real or personal property, credits or effects, within the Province. The object of the suit is to obtain satisfaction of a debt due by him out of those effects. He has notice of the attachment, and is required to submit to the jurisdiction by putting in special bail, and he virtually refuses. I incline rather strongly to the conclusion that till he has put in special bail he has no right to be heard. The plaintiff must prove the amount of his debt or damages, and cannot even then get execution without filing an affidavit of the sum justly due by the absconding debtor, after giving him credit for all payments or claims which might be set off or lawfully claimed at the time of the making such affidavit.

This protection is given by the statute as well in the interests of other creditors of the absconding debtor as of his interest, and the case of *Lavis v. Baker* (13 C. P. 506) is an authority that the Judge might have allowed another creditor to intervene at the trial by cross-examining the plaintiff's witnesses, &c. I should question, however, if not the power, the discretion of the Judge to make it a condition of allowing the plaintiff to proceed that the absconding debtor should have that privilege, for it would encourage disregard of the warning to put in special bail. Conceding that the learned Judge might have permitted the privilege claimed, I feel little doubt he might refuse it, and that the refusal furnishes no ground of appeal; but as my brothers have adopted the other conclusion, I am not strong enough in my view to differ from them.

The appeal will therefore be allowed, in order that the defendant may be heard, not to defend but to mitigate the damages.

HAGARTY, J.—I agree in holding that an absconding debtor, unless and until he shall have put in special bail, cannot be allowed to plead to the action. I am not, however, prepared to hold that he may not be allowed to be heard at the trial in mitigation of damages, in the same manner as a defendant after a judgment by *nil dicit*. To place him in any worse position would be to consider him as under some personal disability, as under an outlawry. I do not read the statute as creating such a disability, and I think we should not, unless forced by positive and unequivocal words, so construe the act.

A debtor who has absconded may return to the country, intending to remain and wishing to make the best terms with his creditors; he may be wholly unable to put in special bail; yet it seems unreasonable to deprive him of the common privilege of every debtor who has allowed judgment to go by default, without express legislative authority.

I think the statute, so far from putting him under any express disability, supposes the contrary.

Sect. 24 declares that if any person indebted to him, or having custody of his property, be sued for such debt or property by the absconding debtor, or by any person to whom he has assigned the debt, &c., he may apply to the Court, &c., to stay the proceedings until it be known if the property seized by the Sheriff be sufficient to pay the sums recovered against the absconding debtor, &c.

Sec. 20 allows him to be heard at any time before execution, to shew that he was not really an absconding debtor when the attachment issued, and he may have his costs of defence, and the plaintiff is restrained from issuing execution except for the balance.

This section does not provide for setting aside the writ of attachment, or avoiding any thing done thereunder, but simply points to a reduction of the plaintiff's claim by defendant's costs, and no doubt the existence of other attachments from other creditors would not affect such remedy.

Sec. 23 provides for giving notice of the attachment to any persons owing money to the debtor or holding his pro-

perty, and appears to assume that payment of the debt or delivery of the property to him without such notice would be valid.

On the whole, I see no reason for imposing on the absconding debtor any disability not expressly created by the statute, and therefore I think that he may be heard in mitigation of damages, as a defendant in ordinary cases of judgment by *nil dicit*.

MORRISON, J.—I have with much hesitation brought myself to the same conclusion as my brother Hagarty.

• *Appeal allowed.*

MOROSS V. McALLISTER.

Will—Construction—Tenancy in common.

H. P., who died in 1833, desired by his will that his sons and daughters should meet to have an inventory taken of all his goods and lands, and if any of them had received any goods they should give them in to be appraised and keep them as part of their shares, and if any of them were living on his lands they should keep the same at the inventory price; and at a subsequent meeting they should agree together for the division of "my said goods and chattels, lands and tenements, by me given and bequeathed to them, their heirs and each of their heirs and assigns, for ever, to share and share alike." He left seven children, one of whom, a married daughter, was living on the land in question, with her husband, at the testator's death, and had been so for many years previous. The plaintiff, claiming through another daughter, contended that the will made all testator's children tenants in common of all his land, and that he was entitled to a one-seventh part of this; but

Held, that even if the will created a tenancy in common as to all other lands, it did not extend to lands on which any of the children were living.

EJECTMENT for one undivided seventh part of a parcel of land in the township of Sandwich, being part of lot No. 88, in the 1st concession. Writ tested 22nd February 1866.

The defendant, on the 27th March, 1866, appeared for the whole.

The plaintiff's claim of title was as grantee of Victor Moross and Theresa Moross, his wife, daughter and devisee of Hypolite Poisson.

The defendant's claim of title was under an indenture made between William Hedley Anderson and others and the defendant, dated 28th December, 1863, and by 40 years' possession.

At the trial, at Sandwich, in April last, before Morrison, J., it was admitted that Hypolite Poisson was the owner of the premises in question, and that he made a will, dated 18th July, 1825, and that he died in 1833.

By this will the testator, after giving directions as to his funeral, &c., proceeded, "And immediately after my funeral it is my desire that my sons and daughters meet together, to have an inventory taken of all my goods and chattels, of whatever kind or nature, also of all my lands and tenements lying and being in the township of Sandwich aforesaid, in the county, district and province aforesaid; and at the taking of the said inventory it is my wish that if any of my sons or daughters have received any goods or chattels from me, that they give the same in to be appraised; but it is well understood that the said goods or chattels so appraised is to be and remain in their hands as part of their shares, and any of those that are living on any of my lands and tenements, it is my wish that he or they shall keep the same at the inventory price; and three months afterwards it is my desire that my sons and daughters shall meet at the last place of my residence to compound and agree together and with each other for the division of my said goods and chattels, lands and tenements, by me given and bequeathed to them, their heirs and each of their heirs and assigns for ever, to share and share alike; and should they, my sons and daughters, not agree together for the division of the said estate, then among them to choose two fit and proper persons for the better and more perfect dividing of the said estate, and if those persons so chosen should not agree together as to the division of the said estate, then a third person shall be chosen by the two former persons, and his decision shall be final."

The plaintiff then put in a deed, the execution of which was admitted, dated 2nd June, 1859, made between the said

Victor Moross and Therese his wife, of the first part, and the plaintiff of the second part, whereby, in consideration of \$100, they gave, granted, bargained, sold, &c., to him, the premises in question, together with other land, *habendum* in fee. On this deed was indorsed a certificate, signed by the Judge of the third Circuit Court in and for the County of Wayne, and State of Michigan, stating that this deed was, on the 2nd June (1859), at Detroit, &c., duly executed in the presence of Thomas Lewis, by Therese Moross, wife of Victor Moross, and that she at the same time and place being examined by him apart from her husband, appeared to consent to depart with her estate in the lands in the said deed mentioned freely and without coercion, &c.

On the defence, it was objected that this certificate was invalid; that it was without date, did not state that the examination was before the Judge, and was otherwise informal. Leave was reserved to move on this objection.

The defendant then put in a deed of partition, bearing date the 26th September, 1833, made between Hypolite Poisson, yeoman, Angelique Baucet *dit* Jolibois, Louis Baucet *dit* Jolibois, Therese Moross, and Victor Moross her husband, Phillis Poisson, Archange Campeau and Charles Campeau, her husband, and Felix Poisson, co-heirs and devisees of Hypolite Poisson, deceased, of the one part, and Joseph Poisson, one of the co-heirs, &c., of the other part. After reciting the will of Hypolite Poisson, and that they, the parties to the deed, had had a valuation of such real estate of the testator as was meant to remain undivided, it was witnessed that the said parties had agreed to make partition of the real estate as follows. Then followed a statement that Joseph Poisson was to have in severalty in fee certain parts or lots particularly described as his portion; and the other parties conveyed to him the said parts of lots to hold in fee. Then followed a similar conveyance of certain parts of lots to Hypolite Poisson; then a similar conveyance to Angelique Baucet, of the land (among other lands) for which this ejectment is brought. This deed was executed by all the parties named in the commencement thereof, and was certified to

have been registered on the 9th of November, 1844, but there was no certificate of the examination of either of the married women named therein before any person whatever, as to their consent to depart with their estate and interest in the said lands.

It was admitted by the plaintiff that Louis Baucet, the eldest son and heir-at-law of Angelique Baucet, conveyed to one Caron (as he swore) about sixteen years before the trial; that Caron conveyed to Anderson and Paradis, who conveyed to the defendant, the land in question in this suit.

Louis Baucet swore that he got this land through his mother Angelique; that his father Louis Baucet, died twenty-nine years ago, his mother eighteen; that he was fifty years old; and that as long as he could remember he lived on the premises in question with his father and mother, and after their death, until he sold it to Caron; that his grandfather, Hypolite Poisson, died thirty-three years ago; his (the witness') father and mother being then in possession, and living on the premises, and having done so as long as he could remember, as he was born on the lot; the plaintiff, or his father or mother, never lived thereon. The land in question in this suit was on the corner of the farm, and part of the town of Windsor, fenced in and a house upon it, a part of No. 88, which contained 156 acres. The plaintiff's mother lived in the State of Michigan both before and since her father's death. His father and mother paid no rent, but did not pretend to own the place; they expected to have it after his grandfather's death.

It was objected that the possession of Louis and Angelique Baucet was not adverse, as the notice of claim stated it, and, at all events, it was displaced by the deed of partition, which admitted the testator's title up to his death, and claimed under his will; and that the title by possession was not maintained.

It was finally agreed that a verdict should be entered for the defendant, leave being reserved to the plaintiff to move to

enter a verdict for himself, if the jury ought to have been so directed; the Court to be at liberty to draw inferences of fact as a jury might do.

In Easter Term *Blevins* obtained a rule calling upon the defendant to shew cause why the verdict should not be set aside, and a verdict be entered for the plaintiff, upon the leave reserved, or for a new trial on the law and evidence, and the weight of evidence.

In Michaelmas Term, *Spencer* shewed cause. He made three points, 1st. That the deed to the plaintiff was not shewn to have been executed by Therese Moross in presence of the Judge, who certifies that he examined her as to her consent; and that no year was mentioned in the certificate, only the month and day of the month of execution. 2nd. That a part of the outside sheet of the deed of partition had obviously been torn off; that on this might have been written a certificate from some proper judicial officer that he had examined Therese Moross touching her consent to part with her estate and that she had freely consented. He urged that the Court having power to draw inferences might infer this, and then the defendant's title would be perfect. 3rd. That the possession of nearly if not quite half a century barred the plaintiff.

Robert A. Harrison supported the rule. The certificate of the examination of Therese Moross is word for word in the form given by the statute 14 & 15 Vic., ch. 115. Reading that certificate, the necessary intendment is that the Judge who signed was present when she executed it. The defence fails, because the partition deed, purporting to be executed by two married women, has no certificate of the examination of either. 2nd. The will devises no estate in severalty; and, 3rd, the partition deed affords evidence that Hypolite Poisson was seized in 1833, when the plaintiff was a married woman, under disability, which disability continued till she conveyed to the plaintiff, and that forty years have not elapsed since her right of entry accrued.

DRAPER, C. J. delivered the judgment of the Court.

The only point requiring any consideration is the construction of the will of Hypolite Poisson, made in 1825, though he lived until some time in 1833, before the Real Property Act of 1834; and still longer before the Act abolishing the right derived from primogeniture. As the will, under which both parties derive title, refers to the testator having sons and daughters, it is obvious that Theresa Moross took no title or estate as heiress; her only claim was as devisee.

The testator obviously meant to make an equal division of his real and personal property among his seven children. This is the leading object, and to carry it out he desires that property received by any of them from him during his lifetime shall be taken into account, as he phrases it, "put in," and appraised, and treated as a satisfaction of so much as the appraisal amounts to of the share of the child who had received it. In like manner as to land; if any of his children are living upon any of his lands, he "desires," which we take to be equivalent to wills, that such children shall keep the same at the "inventory" prices.

We think that the testator, in directing an inventory to be taken of his goods and chattels meant more than a list; he meant an appraisal also; and what immediately follows explains this, by requiring the goods previously "received" to be appraised, as a step towards securing equality among them all, but not in any way interfering with the right of property which he had given them in these chattels; while as to lands which any of his children had occupied by his permission, though without any title or conveyance, such child was to keep those lands, but at the inventory price, which price or sum would operate in satisfaction of so much of their claim to an equal part in value of the testator's lands.

This provision, in our opinion, affords a key to the true construction of what follows. Having provided that all the property which he died possessed of, together with what he might have disposed of to any of his children or permitted them to use, should be valued, he expresses his will and

desire as to a division of his goods and lands among his children, speaking of such goods and lands as "by me given and bequeathed to them, their heirs and each of their heirs and assigns for ever, to share and share alike." His intention appears to me to be to make a common fund of land and chattels by a valuation of the whole, and by the language just quoted to provide that each child should have an equal several share, ascertained according to that valuation.

We may concede that if this language had been used in the simple devise of real property the devisees would have taken as tenants in common; but the same words apply equally to the chattels as to the real estate. Now the testator could not mean to make his children tenants in common of all the goods which were to be put into the inventory and appraised, nor to take share and share alike of all the goods of which he died possessed, for part of those to be appraised had already become the property of one or other of his children, and the value of those goods was to be treated as part satisfaction of what those who owned them were to get under the will. He meant *all* the goods previously given by him and also those remaining at his death to be valued, and that the share of each should be one-seventh part according to that value, of which one-seventh some of the children had already got part. Nor could the testator, without annulling the preceding words of his will as to those parts of his lands upon which any of his children were living, have meant that they should all be tenants in common of all his lands, for he would thereby defeat his expressed will that any such child should keep such lands at the inventory price. There is the same desire indicated as there was as to goods—let each retain what they have in possession, but be charged with the appraised value as so much of their share of my whole property; a disposition inconsistent with the definition of a tenancy in common, where the ownership of each tenant extends through every part of the subject matter.

Now what this plaintiff seeks to recover is an undivided seventh part of that portion of Hypolite Poisson's real estate of which, according to the unimpeached evidence of Louis

Baucet, his mother, Archange Baucet, had, with her husband, been in possession as long as he could recollect; and he is fifty years old, and swears he was born upon the place. Upon a proper construction of this will, was the plaintiff's mother, Therese Moross, ever entitled to this undivided seventh?

We think she was not, and that in so holding we are not infringing on the general rule of construction, that if there be two inconsistent clauses in a will, the latter shall prevail. For this rule must be applied in connection with another, that the intention of the testator is to be collected or deduced from the whole of the will, from its leading and general tenor, and where that plainly discloses a particular method of disposition, words and phrases inconsistent therewith must give way. And the authorities shew that this general rule only obtains where the two clauses are so repugnant that they cannot possibly stand together. I refer generally on this point to Jarman on Wills, chapter 15, and the authorities there examined.

We think it clear that the testator intended a division of the property among his seven children, not a conversion of it into money and a division of the proceeds. We think it equally clear that he intended that each child should take a several portion of the goods and lands. In order to lay the foundation for equal division, he requires, as the first step, valuation of everything, expressly including as to chattels such as he had given to any child during his own life; but these, though to be valued, were still the property of him or her who had received them. As to the lands, he had not conveyed any, so far as appears, to any of his children, but he had permitted some of them to live upon—in other words, to possess and enjoy—some parts of them. All his lands, like all his goods, are to be valued, but the actual possessor or possessors is or are to keep what they possess at the testator's death, at the inventory price. And this plainly expressed intention (for I treat the words "it is my wish," as equivalent to *it is my will*) must be taken in connection with the subsequent declaration of what he desired, namely, that his

children should meet together and agree to the division of his goods and chattels, lands and tenements "by me given and bequeathed to them, their heirs and each of their heirs and assigns for ever, to share and share alike." Conceding for argument's sake that these latter words create a tenancy in common as to other lands, we cannot find any reason for thinking that they extend to those lands previously referred to as those on which any of his children had been previously living.

We understand that the plaintiff's claim is to a share of the land spoken of by Louis Baucet, lands on which his father and mother were living many years before Hypolite Poisson died. His claim is under this will. We think the true construction of the will does not support it.

Rule discharged.

WADDELL V. ROBERTSON ET AL.

County Court appeal—Bond, construction of—C. S. U. C. ch. 15, sec. 68.

R., being plaintiff in the County Court, appealed to this Court, giving a bond to the defendant W., as required by the statute, to abide by the decision of this Court of the cause, and "to pay all such sums of money and costs as well as of the said suit as of the said appeal as should be awarded and taxed to said W." The appeal having been dismissed, W. recovered judgment in the Court below. *Held*, affirming the judgment of the County Court, that the bond compelled R. to pay W.'s costs of defence taxed there, not merely the costs of appeal.

Where the decision of the Court appealed to in effect sustains a judgment of the County Court, which disposes of the cause in the respondent's favor, or directs a proceeding or judgment which has that effect, the bond is a security for any debt or damages awarded, and for the costs of the cause as well as of the appeal.

APPEAL from the County Court of Northumberland and Durham.

Declaration—that the defendants by their bond became bound unto the plaintiff in the sum of £30, to be paid by the defendants to the plaintiff, subject to a condition, that if the defendants and one R. should jointly and severally abide by the decision of the Court of Queen's Bench for Upper Canada,

of a certain cause pending in the County Court of the said United Counties, wherein the said R. was plaintiff, and the said Robert Needham Waddell, defendant, and appealed to the said Court of Queen's Bench, and should pay all such sums of money and costs, as well of the said suit as of the said appeal, as should be awarded and taxed to the said R. N. W., the said bond should be void; and the said appeal having, by the judgment of the said Court of Queen's Bench, been dismissed with costs, the said R. N. W. afterwards, to wit, on, &c., recovered judgment in the said County Court against the said R. in the said cause; and the sum of \$35.87 was thereupon duly awarded and taxed therein to the said R. N. W., as and for his costs of defence of the said suit. But although the costs of the said appeal were duly paid to the said R. N. W., yet neither the said R., nor the said defendants, nor either of them, (though respectively required so to do), have paid the said sum of \$35.87, so awarded and taxed to the said R. N. W. in the said suit, or any part thereof, and the same is still wholly due and unpaid.

Plea, that the said R., before action, did pay all such sums of money and costs as well of the said suit as of the said appeal as were awarded and taxed to the said R. N. W., by the said Court of Queen's Bench, according to the condition of the said bond in the said declaration mentioned.

Demurrer, on the grounds, that the plea of the defendants raises an immaterial issue, by averring the performance of a mere matter of fact not charged as a breach of condition in the declaration—namely, the payment of the costs awarded and taxed by the said Court of Queen's Bench; that the plea of the defendants sets forth a performance of the condition otherwise than in the terms of the condition itself, and is uncertain and ambiguous.

Defendants joined in demurrer, and excepted to the declaration: 1. That the declaration is defective and bad, in not containing an averment or statement that the Court of Queen's Bench awarded the costs of the suit between the said R. and the said R. N. W. mentioned in the declaration, as well as the costs of appeal, to be paid by the said R., or the defen-

dants; and in not stating that the said costs of suit were certified to and formed part of the judgment of this honorable Court, according to the statute in that behalf. 2. That the costs of appeal only were awarded by the said Court of Queen's Bench to be paid by the said R., and not the costs of the said suit. 3. That the plaintiff admits by his declaration that he has no cause of action, inasmuch as he alleges that he has been fully paid the said costs of appeal.

The judgment of the Court below was in favour of the plaintiff, on the ground that defendants were bound to pay not only the costs awarded by the Court of Queen's Bench, *i. e.*, the costs of appeal, but the costs of the suit awarded and taxed in the County Court.

The defendants appealed.

J. D. Armour, for the appellants, cited *Stansfield v. Hel-lawell*, 7 Ex. 373; *Robinson v. Waddell*, 24 U. C. R. 488.

C. S. Patterson, contra.

DRAPER, C. J., delivered the judgment of the Court.

We are of opinion the plaintiff is entitled to our judgment on this appeal, first, because the plea is not in form an answer to the declaration, and, second, because we are of opinion that the declaration is sufficient.

The clause (68) of the County Court Act, Consol. Stat. U. C. ch. 15, is not very clearly expressed. It states that the condition of the appeal bond shall be "to abide by the decision of the cause *by the Court to be appealed to*, and to pay all sums of money and costs as well of the suit as of the appeal awarded and taxed to the opposite party."

In the original Act, 8 Vic. ch. 13, sec. 57, the words "by the Court to be appealed to" are not to be found. Their introduction has given rise to a doubt. The Court appealed to does not and cannot, in a great many instances, decide the cause, because the decision of the matter appealed is not an end of the cause, and the Judge of the County Court has to proceed in it according to the decision on the appeal.

Take, for instance, what may be and I have reason to be-

lieve are the facts of this case. The plaintiff Waddell was sued in the County Court. A verdict was given against him. He applied for a new trial, and the Court below granted it. This decision was appealed against, and the bond now sued upon was given. The appeal was dismissed, and the declaration avers that afterwards the present plaintiff recovered judgment against the plaintiff below, Robinson, and taxed his costs of defence at \$35.87, for which he now sues on the bond, admitting in the declaration that the costs of the appeal had been paid. The costs of defence could not have been taxed in the Queen's Bench, for at the determination of the appeal it was uncertain who would succeed in the action, which, according to the County Court Act, was proceeded with in the lower tribunal to which it was remitted.

The only question is, does the bond extend to cover these costs of defence, or is there a distinction when a defendant appeals and when a plaintiff appeals, as to the effect of the bond?

Cases may be suggested which render the meaning of the language used somewhat doubtful.

If there be a decision adverse to the defendant, as on a motion to enter verdict on leave reserved, and he appeals, and the appeal is dismissed, will not the words of the condition, "*to pay all sums of money and costs* as well of the suit as of the appeal," make the obligors responsible for the debt as well as the costs?

If a verdict be given against a defendant, and he applies for a new trial, which is refused, and he appeals, and the Court of Appeal order a new trial, then, as according to the statute the appeal bond is, after the opinion of the Court of Appeal is given, to be delivered to the successful party, the defendant is entitled to his bond, and though the plaintiff afterwards recovers, yet the bond will not be a security to him, as it may be in the case first supposed.

Here the plaintiff below was the appellant, and though his bond was according to the words of the statute, yet he would not be liable to pay any sum of money except what would be taxed as part of the costs, unless in the exceptional case.

of a plea of set-off and verdict upon it awarding some sum to the defendant. The case being remitted for further proceeding in the Court below, is the bond a security for the costs in the Court below up to the time of the appeal, and after the determination of the appeal, or to either of them?

We think the true construction of the act is, that where the decision of the Court of Appeal in effect sustains a judgment of the County Court which disposes of the cause, or directs a proceeding or judgment which has that effect, in the respondent's favour, there the bond is a security for any debt or damages awarded, and for the costs of the cause as well as of the appeal.

Where the appellant succeeds, he is entitled to have the appeal bond delivered up to him.

Appeal dismissed.

PARSONS V. FERRIBY.

Ejectment—Notice of title—Amendment—Practice—Misconduct.

In ejectment, the plaintiff's notice of title being defective, in claiming under an agreement for a lease instead of a lease, the Judge at *Nisi Prius* granted a summons to amend it, returnable before himself as a Judge in Chambers, in half an hour, and upon it made an order for the amendment. The case then proceeded, and the plaintiff had a verdict.

It is no ground for a new trial that the cause was taken out of its turn on the docket.

Defendant moved against the verdict for irregularity, because no issue book had been served in time, shewing by his affidavits that notice of trial was given on the 11th October, and that on the commission day an issue book with notice of plaintiff's, but not of defendant's title, was served. In answer it was sworn that with the notice of trial an issue book had been served, with which, for a reason explained, no copy of plaintiff's notice of title was given, and that, according to promise, such notice was given afterwards, to which a copy of the issue book was attached, to make it intelligible.

The Court severely censured the conduct of defendant's attorney, in suppressing the fact of an issue book having been delivered with the notice of trial.

Quære, whether when A. is in possession of premises, as hired servant of B., a writ of ejectment should not be directed to the latter.

EJECTMENT for the Ker Hill farm, in the township of Brantford. The summons was addressed to Ferriby, who did not enter an appearance, and was dated 31st January,

1866. On the 17th May, 1866, a Judge's order was made, that John Crosby McNaught be at liberty to appear and defend the suit along with and in addition to the other defendants, against whom judgment had been signed, that judgment to stand, but proceedings thereon to be stayed till the final result of this cause with McNaught.

The plaintiff's claim of title, served with the writ of summons, was by virtue of an agreement for a lease of the said premises, between one John McNaught, as lessor, and Robert Ballingall as lessee, and a purchase thereof from the Sheriff of the County of Brant, under an execution out of the County Court of that county, at the suit of John Jenkins against Robert Ballingall.

It is unnecessary to set out McNaught's notice of title, as nothing whatever turns upon it.

The trial took place at Brantford, before Adam Wilson, J., in October, 1866.

No one appeared as counsel for either Ferriby or McNaught.

The plaintiff gave evidence sufficiently establishing, in the opinion of the learned Judge, or rather sufficient to be left to the jury to establish, that there was a legal estate and term existing, liable to seizure and sale, and it was seized and sold by the Sheriff.

But during the trial the learned Judge noticed that the plaintiff's notice of title was under an agreement for a lease, and not under a lease; and being of opinion that under such a notice evidence of a lease was not admissible, he, according to his report of the trial, granted a summons upon the defendant to appear, in half an hour after service, to shew cause before the learned Judge, *as a Judge in Chambers*, why the notice should not be amended; acting under the authority of *Doe Stanway v. Rock* (6 Jur. 266). The defendant's attorney appeared to this summons and shewed cause, and filed an affidavit. After hearing the parties by their attorneys or agents, the learned Judge made an order, which was attached to the record of *Nisi Prius*, for the amendment. No conditions were stated in the order. Then the plaintiff's counsel

summed up his evidence; the learned Judge charged the jury; and they found for the plaintiff.

In Michaelmas Term *M. C. Cameron*, Q. C., obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside for irregularity, as no issue book was served eight days before the assizes, and the cause was tried out of its turn in McNaught's absence; or on the merits, McNaught being owner in fee, and his tenant, Ballingall, having surrendered his term before the same was sold by the Sheriff, or bound by the execution under which the Sheriff sold; and on grounds disclosed in affidavits and papers filed.

In this term *Robert A. Harrison* shewed cause, citing *Heron v. Elliott et al.*, 1 U. C. L. J. 156 N. S.; *Peebles v. Lottridge*, 18 U. C. R. 628.

M. C. Cameron, Q. C., supported the rule.

DRAPER, C. J., delivered the judgment of the Court.

The defendant's case, as made by the affidavits, on the question of practice and regularity was this: He admitted service of notice of trial on the eleventh day of October, for Monday the 22nd of the same month, but shewed by affidavits that about nine o'clock, a. m., of the assize day, an issue book, to which was attached a notice of the plaintiff's title (but not of defendant's) was served, and that about an hour afterwards the plaintiff's attorney served a notice requiring McNaught to prove his legal title to the possession, whereupon defendant's attorney told the plaintiffs that he could not go to trial until the Thursday, and could not accept the issue book unless upon that understanding, and that if the case was called on before, the plaintiff's attorney must withdraw the record, or he (defendant's attorney) would object to the service of the issue book: that the cause was tried on Tuesday, 23rd October, before a case which stood before it on the docket, and before the arrival of the defendant's witnesses, when the defendant's attorney was not in Court, and no counsel appeared for defendant.

The answer to this is, an affidavit distinctly swearing that with the notice of trial an issue book, with a copy of defendant's notice of title attached, was served on defendant's attorney, and an explanation is given why a copy of the plaintiff's notice of title was not given at the same time, and that, according to a promise made, the plaintiff's attorney served, on the 22nd of October, a copy of the plaintiff's title, and served with it a copy of the issue book, because the notice referred to the lands and tenements "in the annexed writ named," and the issue book, containing a copy of the writ, would make the notice clearly intelligible.

It is a very improper and reprehensible act in the defendant's attorney to bring this application before the Court, with a suppression of the material fact that an issue book was delivered on the 11th of October, together with the notice of trial. If it was defective because a copy of the plaintiff's claim of title was not attached, and if this be an irregularity, and the defendant's attorney intended to avail himself of it, he should, we apprehend, have returned it, or at least have given the plaintiff's attorney notice of the alleged irregularity, and not to proceed to trial. The affidavit of the defendant's attorney displaces this ground of objection, and if this were the only question our inclination is strong that we should discharge the rule and make the defendant's attorney pay the costs.

Nor do we attach any importance to the objection that the cause was taken out of its turn, for though there was one cause entered before it, which was untried, that cause, it is sworn, had been fixed for the following day; and we do not think it any ground of objection in itself, for we do not agree that the Judge at *Nisi Prius* has his course fettered by the order in which cases are entered on the docket. His duty is rather so to proceed as will best facilitate the transaction of the business before him, and it is left in his discretion how to discharge this duty. Besides, it is obvious the defendant's counsel advisedly abstained from appearing. If it had appeared clear that he did so because on the claim of title put in by the plaintiff it was impossible he should suc-

ceed, and therefore the defendant need not defend, there would have been more apparent reason for such a course, though he would have incurred the peril of the 24th section of the Ejectment Act, as expounded by rule 94 of the rules of Trinity Term, 20 Vic. By not appearing he would admit the title set out in the plaintiff's notice, to which title the plaintiff was limited, and he might have been content to admit that title, which, as the learned Judge held at the trial, amounted to nothing. He could not be blamed for not anticipating what really did occur as to the amendment.

As to the merits, we are not satisfied that if, as appears by an affidavit filed by the plaintiff, Ferriby was in possession as the hired servant of Ballingall the tenant, that the writ should not have been directed to him, but no objection is taken on that score.

The Sheriff's deed, dated the 31st January, 1856, recites that Ballingall is in possession of all the property seized under the execution, and the ejectment summons is dated the same day.

Nor is any question made respecting the amendment at the trial, the particulars of which are only before us through the learned Judge's report of the trial. As that amendment purports to have been made in Chambers, and not by the learned Judge sitting at *Nisi Prius*, any objection could only have been taken on motion to rescind the order to amend. For the purposes of this motion it is acquiesced in.

[The learned Chief Justice then proceeded to discuss further the merits of the case, upon which, under all the circumstances, it was thought proper to grant a new trial on payment of costs.]

New trial, on payment of costs.

REGINA V. MAGRATH.

Indictment under C. S. U. C., ch. 98—Plea, Autrefois Acquit.

The prisoner being indicted under Consol. Stat. U. C., ch. 98, and charged as a citizen of the United States, was acquitted on proving himself to be a British subject. He was then indicted as a subject of Her Majesty, and pleaded *autrefois acquit*.

Held, that the plea was not proved, for that by the statute the offence in the case of a foreigner and a subject is substantially different, the evidence, irrespective of national *status*, which would convict a foreigner, being insufficient as against a subject; and the prisoner therefore was not in legal peril on the first indictment.

THE prisoner was indicted under the third section of Consol. Stat. U. C., ch. 98—that is, under the section substituted for the third section of the original act, and directed to be taken and read as such third section, by the statute 29–30 Vic., ch. 4, sec. 2. The substituted third section read thus :

“Every subject of Her Majesty, and every citizen or “subject of any foreign state or country who has at any “time heretofore offended or may at any time hereafter “offend against the provisions of this act, is and shall be “held to be guilty of felony, and may, notwithstanding the “provisions hereinbefore contained, be prosecuted and tried “before any Court of Oyer and Terminer and General Gaol “Delivery, in and for any county in Upper Canada, in the “same manner as if the offence had been committed in such “county, and upon conviction shall suffer death as a felon.”

The third section, for which this was substituted, contained substantially the same provisions, but extended only to citizens or subjects of any foreign state or country.

By the first section of this act (ch. 98) any citizen or subject of any foreign state or country at peace with Her Majesty, who is or continues in arms against Her Majesty within Upper Canada, or commits any act of hostility therein, or enters Upper Canada with design or intent to levy war against Her Majesty, or to commit any felony therein for which any person would, by the laws of Upper Canada, be liable to suffer death, may be tried and sentenced by a Militia General Court Martial.

The second section is, that if any subject of Her Majesty, within Upper Canada, levies war against Her Majesty, in company with any subjects or citizens of any foreign state or country then at peace with Her Majesty, or enters Upper Canada in company with any such subjects or citizens with intent to levy war on Her Majesty, or to commit any such act of felony as aforesaid, or if with the design or intent to aid or assist he joins himself to any person or persons whatsoever, whether subjects or aliens, who have entered Upper Canada with design or intent to levy war on Her Majesty, or to commit any such felony within the same, such subject may be tried by a Militia Court Martial, in like manner, &c.

Under this act the prisoner was indicted at the Court of Oyer and Terminer and General Gaol Delivery held in and for the County of York, on the 13th January, 1867, before Morrison, J., charging him as a subject of Her Majesty, that he on, &c., at, &c., in Upper Canada, in company with divers citizens of the United States of America, then at peace with Her Majesty, feloniously did enter Upper Canada with intent to levy war against Her Majesty, against the form, &c.

The second count stated that certain persons entered Upper Canada with intent feloniously to make war on Her Majesty, and that the prisoner feloniously joined himself to such persons with intent and design to assist them in levying war.

The third count stated that the prisoner, in company with divers citizens of a foreign state (as before), who were unlawfully and feloniously assembled, armed, and arrayed in a warlike manner against Her Majesty, did feloniously levy war against Her Majesty, &c.

To this indictment the prisoner pleaded *autrefois acquit*, on which the Attorney General joined issue.

It was proved that at the Court of Oyer and Terminer and General Gaol Delivery held for the County of York, the prisoner had been, on the 8th October, 1866, tried upon an indictment for felony, the first count of which indictment charged him "being a citizen of a certain foreign state, to

“wit the United States of America,” on, &c., at, &c., and while the said foreign state was at peace with Her Majesty, with feloniously entering Upper Canada, with divers other persons, with intent to levy war against the Queen. The second count charged that the prisoner, being a citizen of a certain foreign state (as in the first count) having before then joined himself, and being then and there joined to divers other persons, was feloniously in arms against Her Majesty, within Upper Canada, with intent to levy war against the Queen, &c.

The third count began like the other two, and alleged that the prisoner, having before joined himself and being then joined to divers other persons who were feloniously in arms against Her Majesty, did feloniously commit an act of hostility against Her Majesty within Upper Canada, in this, that he and the said other persons, armed and arrayed in a warlike manner, feloniously did assault and attack Her Majesty’s liege subjects, in the peace of our lady the Queen then being, with intent to levy war against Her Majesty.

Proof was given of the identity of the prisoner with the person tried on this indictment in October, and the evidence given against him on that trial was substantially proved, and also that on that trial evidence was given that the prisoner was a British subject, and that the learned Judge (John Wilson, J.) who then presided, directed his acquittal.

Upon this the prisoner’s counsel contended the jury should be directed to find for the prisoner. The learned Judge held that the plea was not sustained, and the jury found for the Crown. The prisoner then pleaded not guilty, and was tried and convicted, and the learned Judge reserved the case for the opinion of this Court.

J. H. Cameron, Q. C., and *Robert A. Harrison*, for the Crown, cited *Regina v. Green*, 7 Cox 186; *Regina v. Knight*, 9 Cox 437; *Regina v. Connell*, 6 Cox 178; *Regina v. Drury*, 3 C. & K. 190, S. C., 3 Cox 544; *Regina v. Dingman*, 22 U. C. R. 283; *Rex v. Coogan*, 1 Leach C. C. 448; *Rex v. Welsh*, 1 Moo. C. C. 175; *Vaux’s*

Case, 4 Co. 44 *a* ; *Wrote v. Wiggles*, Ib. 45 *b* ; *Com. Dig.*, Indictment, L. ; *Regina v. Charlesworth*, 9 Cox 58.

K. McKenzie, Q. C., contra, cited *Rex v. Sheen*, 2 C. & P. 634 ; *Rex v. Wildey*, 1 M. & S. 184 ; *Regina v. Austin*, 2 Cox 59 ; *Vandercomb's case*, 2 Leach C. C. 720 ; *Rex v. Clark*, 1 B. & B. 473 ; *Rex v. Birchenough*, 1 Moo. C. C. 477 ; *Regina v. Gould*, 9 C. & P. 364.

DRAPER, C. J.—If the prisoner might have been convicted upon the first indictment, although in fact he was acquitted by a mistaken direction of the Judge, he may plead *autrefois acquit*. As where S. was indicted of burglary laid upon the 1st August, and the evidence shewed it was done on the 1st of September, and not on the 1st August, and thereupon he was acquitted, and again indicted laying the true day, it was held he ought not to be tried again “for he *mought* have been found guilty on the first indictment”—2nd Inst. 318.

Therefore, if the substituted section in substance and effect makes it indifferent whether the prisoner was a citizen of a foreign state, for that the offence and felony are the same, then his acquittal when charged as a foreigner, though by direction of or in accordance with the opinion of the Judge who tried him, is an acquittal of the felony, and he cannot be put a second time in peril on account thereof.

The words are *every subject* of Her Majesty, and *every citizen or subject* of a foreign state, who has, &c. It is contended that these words mean neither more nor less than *every person*, who has, &c.

But the section goes on thus, “who has at any time heretofore offended or may at any time hereafter offend against the provisions of this act, is and shall be held to be guilty of felony,” &c.

As the act originally stood, a British subject could only be tried by court martial for the compound offence described in the second section, and that second section does not constitute the compound offence a felony. If it had done so, I apprehend the trial might have been before the ordinary tribunals as well as before a court martial.

The second section is not in express terms altered by the latter statute, nor, as far as I see, was it the intention to alter it further than by declaring the offence defined to be felony. It is a felony not simply consisting of levying war in Upper Canada against the Queen, or of entering into Upper Canada with intent to levy war, or to commit any felony therein punishable by death; but the doing these or some other acts in company with foreigners, with the intents mentioned, or either of them; and this enactment is confined to British subjects.

The first section points at the subjects of foreign states at peace with Her Majesty, and does not combine the acts which in the second section are made punishable with an association with British subjects. Under it foreigners may be tried and convicted, though none but foreigners have offended. British subjects do not commit the statutable felony unless by reason of their association with foreigners.

The offence against the acts committed by a British subject, requires proof not only of the *status* as such subject, but also of the joining with foreigners in the commission of it. The same evidence, irrespective of national *status*, which would convict the foreigner, would not convict the subject; and a man indicted under this act as a foreigner is entitled, on proof of his being a subject, to an acquittal, because as against the subject additional averments and proofs are necessary.

I think therefore that the substituted section does not make the change in the law which was suggested, and that the new third section must be construed as intended to preserve the distinction between the offences committed by a foreigner or a subject of Her Majesty.

But apart from this, it is contended that the substance of the offence charged in both the indictments is the same. I think the authorities lead to a contrary conclusion.

If A. commits a burglary, and at the same time steals goods out of the house, if he be indicted for the larceny only and be acquitted, yet he may be indicted for the burglary afterwards. And *e converso*, if indicted for the burglary

with intent to commit larceny, and he be acquitted, yet he may be indicted of the larceny, for they are several offences, though committed at the same time. See 2 Hale, 245, where other analogous cases are also put, and among them this: that a man acquitted of stealing the horse hath been arraigned and convicted of stealing the saddle, though both were done at the same time. In more modern times Vandercomb's case (2 Leach 708) sustains the same doctrine, and contains a reference to leading authorities down to that period. I refer also to *Regina v. Gisson* (2 C. & K. 781) *Regina v. Green*, (2 Jur. N. S. 1146), and *Regina v. Knight*, (1 Leigh & Cave, C. C. R. 378).

A comparison of the two indictments brings to view variances which are substantial, not mere differences of time, place or quantity, such as by averment might always be shewn to be merely form and not of the essence of the offence charged. It is quite true that on the first indictment, if he had been a foreigner he could have been legally convicted, but inasmuch as the evidence then given proved he was a British subject, his life never was in legal peril upon it. It is not enough to say that possibly on the first trial he might have been unable to prove his actual *status*, and so risked being convicted. We must deal with the fact as it was proved then, and as is now for the purposes of this case incontrovertibly established, by the confession of the present indictment, that the prisoner is a British subject; if so, his peril on the first was imaginary, not real, for only a citizen or subject of a foreign state at peace with Her Majesty could have been legally convicted thereon.

I should willingly have adopted the opposite conclusion, and have given the prisoner the advantage he claims from his previous acquittal, if I had not formed a clear opinion that the law is the other way.

The conviction must be upheld and (if not already done) sentence of death must be pronounced upon the prisoner.

HAGARTY, J.—I think the prisoner was not in legal peril on the first indictment, and if shewn to be a British subject could not be lawfully convicted thereon.

A careful examination of the statute shews that the offences are laid differently as to foreigners and subjects, and that an indictment in the same form will not equally answer for both ; and if the indictment charging him as a foreigner had been amended by calling him a subject, it would have made it bad on demurrer or in arrest of judgment.

He obtains his acquittal exclusively on the fact of his not being a foreigner, and when subsequently indicted as a subject, cannot urge such acquittal as a defence. His *status* was a material fact of averment.

In that view it is unnecessary to discuss the amount of evidence required to establish or negative such *status*, nor whether in fact the same evidence of acts done that would have sufficed to convict the foreigner, might not probably have in most of the cases proved the crime against the subject.

MORRISON, J., concurred.

Conviction affirmed.

WALMSLEY V. WALMSLEY.

Dower—Election—Pleading.

Dower. First Plea.—That demandant's husband by his will gave her an annuity of £25 chargeable on his estate, and a life estate in certain lands, and thereby declared that such annuity should be in lieu of dower : that demandant entered into possession of such property, and received the annuity, and elected to take and did take the same in lieu and satisfaction of her dower.

Second Plea—on equitable grounds—that by said will the husband gave demandant an annuity of £25, which was declared to be in lieu of dower, and was to be paid out of his estate by his executors, and by the same will he devised certain land to her for life : that he afterwards died, leaving besides land personal estate sufficient to pay the annuity : that demandant entered on the land so devised to her, and elected to receive said annuity and devises in lieu of her dower ; but before any payment of such annuity had fallen due, she, against the will of the executor, possessed herself of the personal estate, and converted the same to her own use, and the executor, having no other property out of which he could pay such annuity, was thereby prevented from paying the same, as he would otherwise have done pursuant to the will.

Held on demurrer, both pleas good : that the first was clearly a good defence at law ; and as to the second, though the demandant's wrongful act alone would not defeat her claim, yet there was besides an express averment that she elected to take the annuity and devises in lieu of dower, which was sufficient without shewing the receipt of any portion of the annuity.

DOWER, by Joseph Walmsley and Isabella his wife, formerly the wife of John Walmsley.

First plea, that the said John Walmsley in his life time, to wit, on the 19th September 1846, duly made and published his last will and testament in writing, as by law is required for the passing of real estate, and thereby, amongst other things, did give and bequeath unto his wife, the said Isabella Walmsley, the following real and personal property, to wit, an annuity or legacy of twenty-five pounds, payable yearly, during the term of her natural life, chargeable on his estate, and on the residue of his real estate, also a life estate in lots, &c., (describing the land), also a life estate in a certain leasehold of lands in the City of Toronto, besides other valuable devises and bequests ; and by the said will the said John Walmsley did declare that the said sum of £25 annually should be in lieu of all dower or right and title to dower which she, the said Isabella Walmsley, might be entitled to as the widow of the said John Walmsley. And the said tenant further says, that the said John Walmsley

afterwards departed this life, to wit, on or about the 23rd September, 1846, seized and possessed of the said real and personal property, without having revoked or in any way altered the said will; and the said Isabella Walmsley, before her intermarriage with the said Joseph Walmsley, entered into possession of the said real and personal property so devised and bequeathed to her, and became seized and possessed thereof by virtue of the said will, and then accepted and received and entered into possession of the said annuity of £25, and before her intermarriage with the said Joseph Walmsley elected to take, accept and receive, and did take, accept and receive the said devises and bequests, and the said annuity under the said will, in lieu, recompense and satisfaction of her dower of, in and to all the lands of the said John Walmsley, of which the lands and premises in the said plaint mentioned were a part, according to the said devises and bequests so made to her in that behalf.

Second plea, upon equitable grounds, that in and by the said last will and testament in the first plea mentioned, the said John Walmsley deceased did give and bequeath to his said wife, Isabella, the now claimant Isabella, the sum of £25 yearly and every year after the decease of the said John Walmsley, for the term of her natural life, which said sum of £25 annually was declared by the same will to be in lieu of all dower, or right or title to dower, which she might be entitled to as the widow of the said John Walmsley; and that the said sum of £25 per annum was to be paid in half-yearly payments of £12 10s. each, out of the said testator's estate, by his executors in the said will named, to his widow, the first half-yearly payment to commence and to be made to her in six months from the day of the decease of the said testator. And by his said will the said testator, being seized of divers lands in fee simple, did devise certain of the said lands to his said wife, the claimant Isabella, for her natural life; and the said testator being so seized, afterwards, to wit, on or about the 23rd September, 1846, died, then leaving, besides the said lands, a large personal estate to be administered by his executors in the said will named, which

said personal estate was sufficient for and equal to the payment by the said executors thereof of the said annuity of £25 per annum to the claimant Isabella. And the said tenant further says, that after the death of the said John Walmsley, and before her intermarriage with the said Joseph Walmsley, the claimant Isabella entered upon, had and received the said lands so devised to her by the said will, and became and was, and is, by virtue of the said will, seized and possessed thereof for the term of her natural life; and the said claimant Isabella, before her intermarriage last aforesaid, elected to receive the said annuity and devises in the said will, in lieu of all dower to which she was entitled as the widow of the said John Walmsley. And the said tenant further says, that after the death of the said John Walmsley one only of the executors in the said will named obtained probate thereof, and took upon himself solely the administration of the estate as such executor; and that before any payment of the said annuity had become payable according to the said will, she, the said claimant, before her intermarriage last aforesaid, against the will of the said executor, possessed herself of, and had and enjoyed the said personal estate of the said John Walmsley, and held the same against the said executor, and converted the same to her own use and benefit, and the said executor had not any other property or means in the said estate whereout he could pay the said annuity, or any part thereof; by means whereof the said executor was unable to pay the said claimant, Isabella, the said annuity in the said will mentioned, which the said executor would otherwise have paid to her out of such personal estate, pursuant to the said will.

Demurrer and Joinder.

D. B. Read, Q. C., for the demurrer, cited *Slatter v. Slatter*, 1 *Scott* 82; *Baker v. Baker*, 25 U.C. R. 450; *Cru. Dig.* Vol. 1, p. 192-3.

S. M. Jarvis, contra, cited *Breakenridge v. King*, 4 O. S. 180; *Walton v. Hill*, 8 U. C. R. 562; *Kerr v. Leishman*, 8 *Grant* 435; *Germain v. Shuert*, 7 C. P. 316; *Sopwith v.*

Maughan, 30 Beav. 235; *Roper* on Husband and Wife, 566-603; *Draper* on Dower, 36.

HAGARTY, J. delivered the judgment of the Court.

The first plea is demurred to on many grounds, the only point seriously urged being that at law such a plea was no bar; and Mr. Read, for demandant, chiefly relied on some words of Tindal, C. J., in *Slatter v. Slatter*, addressed to counsel during the argument, according to the report in 1 Scott 82, but not to be found in the report of the same case in 1 Bing. N. C. 259.

But that case is wholly different from the present. Demandant's husband had *died intestate*, and the plea was that after his death she had elected to take an annuity in satisfaction of her dower, and had actually received one half year thereof. It appeared the payment was made many months after the writ of dower was sued out; and after plea pleaded. Nothing is said in either report in the judgment of the Court as to the plea being good at law or not. The evidence was held insufficient to support it.

But the cases in our own Court have decided the point. In *Breakenridge v. King*, (4 O. S. 180), Robinson C. J. said, "Here the plea states that the husband devised lands to this demandant in *full bar* and satisfaction of *her dower*, and further, that after his death she agreed to and ratified the devise. There is no pretence for excepting to this plea," citing *Dyer*, 220; Com. Dig. 2 G. 13, 15.

In *Walton v. Hill*, (8 U. C. R. 565), this case of *Slatter v. Slatter* was cited, and the Court, after noticing the objection as to this defence being only available in equity, say that "when the will expressly declares that what is given is intended to be in lieu of the dower, and where the widow accepts it, she is as much bound by her election in a court of law as in equity, and her claim to dower is as effectually barred."

We therefore think there must be judgment for the tenant on this plea.

As to the second plea on equitable grounds, is only necessary to decide it for purposes of costs.

We are of opinion that the facts shewn as to the tortious possession and conversion by the widow of the personal estate would by itself be no defence at law or in equity. Her mere wrongful act in that respect could not defeat her claim to dower. The only difficulty we feel is, whether rejecting all this statement, enough remains to make a good plea of election. The statement is express, that the annuity was to be in lieu of dower, and the averment also that before her intermarriage with the co-plaintiff she elected to receive the annuity and devises in lieu of dower.

It would seem that it is sufficient to aver her election, without averring her having received any part of the annuity. We have not to consider what evidence might be required to prove such election. According to the statement of the plea in *Brokenridge v. King*, it merely averred that after the death of the husband, the widow "agreed to and ratified the said devise." She may have done some act unequivocally signifying her election; and the averment that before the first payment became due she wrongfully seized on the whole fund, leaving nothing in the executor's hands out of which he could pay her according to the terms of the will, cannot weaken, if it do not strengthen, the averment of her election. There must be judgment for the tenant on both demurrers.

Judgment for Tenant.

THE ATTORNEY GENERAL V. HALLIDAY.

Duty on Spirits—Information for—27-28 Vic., c. 3, 29 V., c. 3—Evidence—Refusal to produce books—Presumption—Prior judgment.

On an information, under 27-28 Vic. 3, against defendant as a distiller, for the non-payment of duty on spirits manufactured by him—

Held, that defendant was liable to pay duty upon all spirits manufactured by him, not merely on such as had been measured and ascertained in the manner pointed out by the statute; for the obtaining the duty on all spirits manufactured is the main object of the act, and the provisions for ascertaining the quantity, &c., are only auxiliary thereto.

2. It was proved by one A. that he sold, as agent for defendant at Montreal, between the days mentioned in the information, 159,608 gallons more than appeared on the credit side of defendant's stock book, and on which duties had been paid; and a number of invoices of these sales, which were produced, represented the spirits to be 50 over proof. Moreover, A. said that large quantities of spirits had been consigned to him direct, and it was to be gathered from the evidence that deliveries had been made to the purchasers direct from the conveyance by which they had been sent by defendant. *Held*, that from this evidence, unanswered in any way, the jury were warranted in finding against defendant for the duty on that quantity.

3. *Held*, also, that the jury were rightly told that defendant's non-production, upon notice, of his books, which he was proved to have kept, furnished ground for strong presumption against him.

4. *Held*, also, that sub-section 2 of 29 Vic., ch. 14, throwing the proof of payment of duty on defendant, was properly treated as applicable, though passed after the period for which duties were claimed; for it related only to matter of evidence and procedure.

5. *Held*, also, that a judgment in defendant's favor, on a previous information against him for penalties for not making true entries of the spirits taken from the close receiver and brought into his distillery, and of the number of gallons disposed of by him, between the days mentioned in this information, was properly rejected as evidence for him in this cause; for there was nothing to connect the spirits on which duties were claimed here with those taken from the receiver, and making true entries of the spirits disposed of by him would not prove payment of the duties.

THIS was an information at the suit of the Attorney General, claiming, on behalf of her Majesty, \$78,000, which the defendant owed, &c.

The information was as follows:—

County of York, one of the United Counties of York and Peel, to wit.

Be it remembered, that the Honourable John Alexander Macdonald, Her Majesty's Attorney General for Upper Canada, who for Her Majesty in this behalf prosecuteth, being present here in Court, on Monday the first day of Easter Term, A.D., 1866, doth, on behalf of Her said Majesty, give the Court here to understand and be informed

that he demands, for and on behalf of Her said Majesty, from one Sherman Smith Halliday, the sum of \$78,000.

For that whereas, by an act of the Legislature of this Province, passed in the 27th & 28th years of Her Majesty's reign, entitled "An act to amend and consolidate the acts respecting duties of excise, and to impose certain new duties;" there were and still are imposed, to be levied and collected on all spirits distilled within this Province, certain duties of excise, to be paid to Her Majesty's Collector of Inland Revenue for the use of Her Majesty, by every distiller carrying on business—to wit, on every wine gallon of spirits of the strength of proof by Sykes hydrometer, and also in proportion for any greater or less strength than the strength of proof, and for any less quantity than a gallon, thirty cents. And whereas, after the passing of the said act, and before the exhibiting of this information, to wit, from the 1st day of September, A.D. 1864, up to and until the 1st day of July, A.D. 1865, the said Sherman Smith Halliday was a distiller in the village of Maitland, in this Province, and was duly licensed as such, as by law required, and then and there, during all the time aforesaid, he, the said S. S. Halliday, carried on business subject to excise as such distiller. And whereas the said S. S. Halliday, so carrying on such business as aforesaid, during the time aforesaid, and before the exhibiting of this information, distilled and made at his distillery, at Maitland, divers large quantities of spirits, amounting to wit to 600,000 wine gallons of the strength of proof by Sykes hydrometer, upon which there were by law imposed and payable duties of excise at the rate aforesaid, but which duties in respect of a large portion of the said spirits so distilled and made by the said S. S. Halliday, as aforesaid, to wit, 260,000 wine gallons thereof, of the strength of proof by Sykes hydrometer, he, the said S. S. Halliday, failed, neglected, and refused to pay to Her Majesty's Collector of Inland Revenue, or other officer of Her Majesty in that locality, and the same still remain wholly unpaid; and before and at the time of the exhibiting of this information the said S. S. Halliday was and still is

indebted to Her said Majesty, our Sovereign Lady the Queen, in a large sum of money, to wit, the sum of \$78,000 above demanded, for such duties upon and in respect of the said last mentioned quantity of spirits so distilled, and on which the said duties had not been paid as aforesaid, which said sum of money became and was due and payable, and ought to have been paid by the said S. S. Halliday before the day of the exhibiting of this information; and by reason of the said moneys, to wit, the said sum of \$78,000, being and remaining wholly unpaid, as aforesaid, to or for the use of Her Majesty, an action hath accrued to Her Majesty to demand and have the same of and from the said S. S. Halliday; yet the said S. S. Halliday hath not paid the said sum above demanded, or any part thereof, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to the damage of Her said Majesty of \$100,000; wherefore the said Attorney General, on behalf of Her said Majesty, prayeth the consideration of this Honourable Court in the premises, and that the said debt and damages may be adjudged to Her said Majesty, and that the said S. S. Halliday may appear here in Court to answer concerning the premises and the said debt and damages.

To this information the defendant pleaded *nil debet*, on which issue was joined, and the trial took place at Toronto, in January last, before Morrison, J., and a special jury.

On the part of the crown, Mr. Brunel was called, an inspector of excise, who proved that defendant was a licensed distiller at Maitland; that he, witness, conducted several investigations respecting the defendant's distillery; that on different occasions he saw defendant's stock book, and examined it in the presence of defendant; that he had it copied (service of notice to produce defendant's books was admitted, and defendant's counsel declined to produce the stock book). Witness proved a document put in, headed "Distillery Stock Book No. 2—Spirits," to be a copy of defendant's stock book, which copy had been used on former trials as an admitted copy. This stock book appeared to

be opened on the 1st of September, 1864, the entries ending in the beginning of July, 1865; and the Dr. side purported to contain all the spirits distilled and taken from the close receiver as well as bought or obtained from other sources; the Cr. side shewing to whom the same was sold and the mode of conveyance; if in bond, the warehouse.

Mr. Brunel further proved that the defendant made the semi-monthly returns of the spirits manufactured by him required by the statute, which original returns were produced, shewing in all 291,341 gallons during the period in question; that the spirits in the receivers, until gauged and tested, were under locks, the keys of which were kept by the collector in charge of the distillery, and that, if all the regulations were complied with, no spirits could be withdrawn without the collector's knowledge; that during the investigations conducted by the witness, he discovered no contrivance for drawing off the spirits secretly, yet nevertheless he was not satisfied.

Peter Arnold was examined, who stated that he was employed by the defendant for the sale of his spirits in Montreal, where Borst, Halliday & Co. had a warehouse. It appeared also that this witness was defendant's brother-in-law; that he had been with defendant eight or nine years, and had been his agent to sell spirits in Toronto, where defendant had previously carried on business; that when in Maitland he attended to the general business of the defendant, making sales and entries and doing any thing that was necessary to be done; that he was half of his time at Maitland and half at Montreal. He proved that he made sales of spirits for B. H. & Co. to various parties between Sept. 1st, 1864, and the 1st July, 1865.

The original accounts or invoices were put into his hands, shewing sales to the amount of 409,127 gallons proof, of which sales only 140,465 gallons were entered on the Cr. side of the defendant's stock book proved by Mr. Brunel, and he stated that all the spirits sold by him were sold as

manufactured by B. H. & Co.—that is, the invoices were made out as such ; that B. H. & Co. consigned large quantities of spirits to witness direct.

On his cross-examination, he stated that on the 1st Sept., 1864, defendant had 221 puncheons of spirits in store in Montreal, and something like 400 puncheons at Maitland belonging to one Reid, neither of which quantities were entered in the stock book. He also stated that when he made sales he entered them in the stock book on his return to Maitland. He also proved that a book produced was the one required to be kept at the distillery, in which was entered the amount of gallons tested and measured from time to time by Mr. Wilson, the collector, whose initials were set opposite each item indicating its correctness ; that from this book the semi-monthly returns were made out, the aggregate amount being 241,545 gallons. The witness was examined at length as to the quantity of spirits on hand. He could only state, with reference to the alleged purchase of 400 puncheons by Reid, that he had reason to think there was such a sale ; that a number of puncheons and barrels he saw on the premises he supposed to be Reid's, but whether they were empty or full he did not know, or that they contained whiskey, or where it was manufactured ; Reid he never saw ; all that he knew was that he got an order from B. H. & Co., apparently signed by one Reid, to receive whiskey, which whiskey he sold under instructions from B. & H. & Co., and remitted the money to them ; and as to the 221 puncheons in defendant's warehouse in Montreal, he did not know where it came from, but sold it as B. H. & Co's.

W. H. Chisholm, who was the defendant's book-keeper in the office at Maitland, proved that he sometimes shipped spirits for defendant. Fifty-four original shipping bills were shewn to witness, each for 21 puncheons of spirits, which he proved were sent to the last witness at Montreal, between the 1st November, 1864, and 1st July, 1865, (a puncheon according to Arnold's evidence averaged 17½ gallons proof.) He also stated that he saw a person called

Reid, professing to be from Ogdensburg, in the winter of 1864-65; that he bought a lot of spirits; that he gave an order for them. An order was produced by the defendant and shewn to the witness, which he could not identify, but he said he saw an order signed by one Reid. The spirits mentioned in the order were sent to Arnold, and he proved that 12 shipments of 21 puncheons each were sent to Arnold from Maitland. The shipping bills being shewn to the witness, he stated that he kept no separate account of that lot of spirits; that he remembered some American money being placed to Reid's credit; that he knew nothing of Reid; that he never saw him before or since; that he did not remember entering this large sale in the books; that if it passed through the books it did so upon the returns from Arnold; and he stated he did not think the money received from Arnold on the sale of Reid's spirits passed to Reid's credit, and he said "I don't know much about this matter of Reid's." The witness further stated that both Borst and defendant did business without telling him; that he could not say whether the sales were entered in the sales book; that they might be in a memorandum book.

The defendant was called upon to produce his books under notice; but he declined to do so.

Mr. Brunel was recalled, and stated that when he was conducting an investigation respecting the distillery, he required from the defendant his sales book from the commencement of the distillery: that it was produced: that he made an abstract of it, which he still had: that from memory and the memorandum he was certain that no such name as Reid was on the sales book, nor any one sale of so large a quantity as stated.

On the part of the defence, the testimony of Mr. Wilson, the Collector of Inland Revenue at Maitland, taken on two former trials, by consent was read to the jury from the notes of the learned Judges who tried the causes, as evidence in this cause. It went to shew that he was watchful and attentive to his duties as such officer; that he discovered nothing wrong, and did not think that any wrong was committed.

Martin O'Donohue, who was employed as rectifier for defendant, stated, that he had no knowledge that any of the locks in the close receivers were tampered with, or that any spirits was improperly withdrawn from the receivers, or without being measured by the collector.

The defendant's counsel, *Mr. J. H. Cameron*, Q. C., proposed to put in an exemplification of a judgment roll in a case of the *Attorney General v. The Same Defendant*. The information contained two counts. First count, for the recovery of a penalty of \$200 for not making true entries in defendant's stock book of the total amount of wine gallons of spirits taken from the close receiver, and bought or brought into the distillery between the 1st of September, 1864, and the 1st of July, 1865, averring that 200,000 gallons distilled and taken from the close receiver was not entered, &c., and that defendant forfeited a further penalty of three times the amount of the duty payable on the 200,000 gallons. Second count, for penalty for not making true entries of the total number of wine gallons of spirits disposed of by defendant between the same dates, and averring that 200,000 gallons disposed of was not entered, and that defendant forfeited a further penalty of three times the amount of the duty, &c. *Plea*, not guilty, and judgment for defendant. Its reception was objected to by the counsel for the Crown, and the learned Judge sustained the objection.

During the progress of the case, objection was taken by the counsel for the Crown, as to the relevancy of some testimony brought out on the cross-examination of the witness Brunel, by the defendant's counsel, and the ruling of the learned Judge was desired with a view to the conduct of the case; and after hearing counsel, the learned Judge ruled that the action lay to recover duties on spirits distilled but not guaged or measured under the provisions of the act, (reserving leave to the defendant to move to enter a verdict for him on this point); and that as to the spirits proved to be in defendant's possession between the periods in question, the onus lay on the defendant to prove that the

duties were paid on such spirits, or that he purchased or received it for sale.

The learned Judge, in his charge to the jury, told them that the defendant was liable to pay duty on all spirits shewn to have been manufactured at his distillery, and that the burden of proof lay upon him to shew that he paid the duty; that if they were satisfied the defendant, being a licensed distiller, had in his possession the quantity of spirits proved to have been sold by Arnold, that *primâ facie* he manufactured it, and that it was evidence to go to them that he did so. As to the amount, he told them if they were satisfied that the 400 puncheons alleged to have been sold to Reid was sold before the 1st September, 1864, that the defendant ought not to be charged with it; and as to the 221 puncheons said to be in Montreal, if it was there before the same date, to deduct it also. These two quantities made 109,054 gallons, to be deducted from the 268,662 gallons claimed by the Crown upon which no duty was paid, leaving 159,608 gallons; and he told them that if from the evidence they were not satisfied that that amount of 159,608 gallons was manufactured by the defendant, the defendant was entitled to a verdict, or only liable to so much of it as they might find manufactured by him and no duty paid.

The learned Judge further reported, that in his address to the jury, referring to the remarks of defendant's counsel upon the hardship thrown on the defendant to account for the spirits in dispute, he commented strongly on the absence of the defendant's books, which it appeared from the evidence he kept, and which he declined to produce after notice to do so; and told the jury that his omitting to do so furnished ground for a presumption to his disadvantage.

Mr. J. H. Cameron, Q.C., the defendant's counsel, objected to the charge on the following grounds: 1st. In telling the jury that the spirits proved to be in defendant's possession and as having been sold by him, was evidence to go to them that it was manufactured at his distillery; 2. That the defendant should have shewn, if not manufactured by him, how it came

into his possession ; 3. The learned Judge misdirected the jury, in telling them that defendant not having produced his books was a presumption to his disadvantage, and saying that the defendant should have produced his books. 4. That the jury should have been told, that they should be satisfied that all the spirits were manufactured at the defendant's distillery. 5. That it should have been left to them to say whether they were or were not satisfied that the spirits mentioned in the semi-monthly returns was all that was manufactured. 6. That there was no evidence of the strength of the spirits.

The jury found for the Crown \$47,999, the duty on the 159,664 gallons.

J. H. Cameron, Q.C., obtained a rule *nisi* for a new trial, on the following grounds :

1st. That no indebtedness was incurred by the defendant, except upon the quantities of spirits ascertained in the manner pointed out by the statute ; that the defendant was not liable for duties on any greater quantities than were gauged or ascertained by the officer of excise, or than according to the measurements, accounts and returns by him kept and made, as shewn at the trial.

2nd. That there was not sufficient evidence of the spirits on which the duties were claimed having been manufactured by the defendant, or of the quantity claimed having being manufactured, or of the quantity sold having been of the strength asserted ; and that no indebtedness for duties by the defendant beyond the amount paid was established, nor any right to recover on this information.

3rd. For misdirection, in directing the jury that they should say simply what quantity of spirits the defendant had in his possession, and what part of that quantity had paid duty, and that defendant was liable to pay duty on the residue, without other proof that the spirits had been manufactured by him ; and in not directing the jury that they should be satisfied that the spirits in his possession or sold by him had been manufactured by him ; and in directing that when spirits

were shewn to have been in the possession of or to have been sold by him, the burden of proof that the duties had been paid thereon was cast upon him by the statute 29 Vic. c. 3, s. 14, and that in the absence of such proof on his part, he was to be held liable for the payment of such duties. And in directing that if they were satisfied that the defendant had in his possession the quantity of spirits proved to have been sold by his clerk, that *primâ facie* shewed that he manufactured it, and that the onus was on him to shew that he had paid the duties thereon, or that he purchased it or otherwise received it; and that in the absence of such proof on the part of the defendant, they should find for the Crown. And in charging the jury that the non-production of his books was strong presumptive evidence against him, and that the burden of proof was on the defendant.

And for the rejection of evidence, in not allowing the defendant to give in evidence the judgment in his favour in a suit or information *in personam* against him, in reference to the same spirits upon which duty was claimed in this cause

Galt, Q. C., Anderson, and Robert A. Harrison shewed cause (a), citing Tay. Ev., 4th Ed., Sec. 102; *Vandercomb's Case*, 2 Leach C. C. 717; *Best* on Ev. 374, 527; *Armory v. Delamirie*, 1 Sm. Lea Cas., 5th Ed., 308; *Duchess of Kingston's Case*, 2 Sm. Lea. Cas. 669; Tay. Ev. Sec. 1507; *Dickson v. Evans*, 6 T. R. 60; *Rex v. Turner*, 5 M. & S. 206; *Morton v. Copeland*, 16 C. B. 517; *Bessey v. Windham*, 6 Q. B. 166; *Solomon v. Gordon*, 2 W. Bl. 813; *Manning's Exchequer*, 201; *Attorney General v. Towns*, 6 Price 198; *Paddon v. Bartlett*, 3 A. & E. 893; *Hitchcock v. Way*, 6 A. & E.

(a) Mr. Harrison was heard, without objection on the part of the defendant, after some discussion as to the propriety of hearing more than two Counsel on a side. It was stated at the Bar that the practice in England is to hear only one on each side, on a demurrer, writ of error, or special case, and any number on a rule; and that our practice on demurrer, of hearing two on each side and one in reply, was taken from the House of Lords' practice. See *Willson v. Carey*, 10 M. & W. 644.

The Court, in a subsequent case, *Coleman v. Kerr*, argued in Easter Term, 1867, but not yet decided, refused to hear more than one Counsel on either side in an appeal from the County Court.

949; *Moon v. Durden*, 2 Ex. 28; *Jackson v. Woolley*, 8 E. & B. 778.

J. H. Cameron, Q. C., *S. Richards*, Q. C., and *M. C. Cameron*, Q. C., contra, cited *Mills v. Bayley*, 2 H. & C. 36; *Scott v. Avery*, 8 Ex. 487; *Northampton Gas Light Co. v. Parnell*, 15 C. B. 630; *Tredwen v. Holman*, 31 L. J. Ex. 398; *Hemans v. Picciotto*, 1 C. B. N. S. 646; *Westwood v. Secretary of State for India*, 7 L. T. Rep. N. S. 736; *Brown v. Overbury*, 11 Ex. 715; *Barrow v. Arnaud*, 8 Q. B. 595; *Leeds and Liverpool Canal Co. v. Hustler*, 1 B. & C. 424; *Stourbridge Canal Co. v. Wheeley*, 2 B. & Ad. 793; *Lord v. Wardle*, 4 Scott 402; *Campbell v. Holmes*, 21 U. C. R. 465; *Mair v. Culy*, 12 U. C. R. 71; *Toulmin v. Hedley*, 2 C. & K. 157; *Eastmure v. Laws*, 5 Bing. N. C. 444; *Harmer v. Gouinlock*, 21 U. C. R. 260; *Whittaker v. Jackson*, 11 L. T. Rep. N. S. 155; *Regina v. Inhabitants of Haughton*, 1 E. & B. 501; *Regina v. Johnson*, 9 Jur. 1010; *Evans v. Williams*, 11 L. T. Rep. N. S. 762; *Thompson v. Lack*, 3 C. B. 542.

DRAPER, C. J., delivered the judgment of the Court.

The general proposition urged for the defendant's non-liability is this:—that the Legislature has not imposed duties of excise upon any spirits except such as, first, have passed from the tail of the worm into the spirit receiver; and, second, upon the quantity which has so passed, ascertained by guaging and proving the strength thereof in the receiver, or duly authorized apparatus (27–28 V. ch. 3, s. 37), or when (s. 69) the amount of duty has been ascertained by calculation founded on the measurement, weights, accounts and returns which it is the distiller's duty to make every half month, and which should shew the quantity of spirits produced on each day, as well as some other particulars.

We take it to be beyond question, that the fundamental object of the act is to raise revenue by the imposition of duties upon distilled spirits, among other things. The act requires every person carrying on the trade of a distiller to take out a license; numerous and minute directions and par-

ticulars are given and prescribed as to the carrying on the manufacture; many provisions are made to insure, as far as enactment could insure, that the distiller should pay the duties on all the spirits he manufactured—in other words, to prevent any being manufactured without the knowledge of the excise officer; punishments and penalties are inflicted for neglecting to comply with or for wilfully violating any of the regulations. The penalties are generally certain, but they are sometimes coupled with the obligation to pay, as in the case of unlicensed distilling, double the amount of the excise duty, and the license duty which the act imposes. (Secs. 101, 102).

By the 29 Vic. ch. 3, s. 5, if the Commissioner of Customs or of Excise shall have cause to believe that the returns of the quantities of spirits manufactured are incorrect, he has power to direct certain specified enquiries, and to amend the returns according to the result, though the quantity of spirits has not been ascertained according to secs. 37 or 69, but under this separate proceeding.

The defendant's argument treats the statute as in effect imposing no duties upon spirits distilled by a licensed distiller, unless the quantity has been ascertained in the mode provided by the act, as if the ascertaining the number of gallons by a particular mode was the principal intention, and the collection of duties was secondary thereto. We think the obtaining the duties the main design, and the other provisions are merely auxiliary thereto; otherwise the duties may be successfully evaded by taking the chance that evidence cannot be found to subject the distiller to the penalty. We do not believe such is either the intention or the effect of the statute. We are strengthened in our view by the 115th section, which makes duties of excise recoverable whether an account (s. 62) has or has not been rendered or a true return made, and coupled with the additional declaration in the Act 29 Vic. ch. 3, sec. 14, subsec. 2, which is made part of the first statute, that the burden of proof that the duties of excise have been paid shall lie upon the parties whose duty it was to pay such duties. Then again, by s. 119, "the payment of any

penalty or forfeiture incurred under this act shall not discharge the party paying the same from the obligation to pay all duties due by such party, and the same shall be paid and may be recovered as if such penalty had not been paid or incurred."

We cannot accede to Mr. Richards' proposition, that the liability of the defendant to pay duties is to be treated on the footing of a contract with the Crown to pay duties on as many gallons as should be ascertained in some prescribed manner. It appears to us a mere *petitio principii*, for it requires the concession that the statute does not, as a general rule, impose duties upon every gallon of spirits manufactured by a licensed distiller, but only on as many gallons as it shall be ascertained by a specified method that he has manufactured. We do not so understand the intention of the Legislature. Of the cases cited on this branch of the argument, only one requires observation, that of *Barrow v. Arnaud* (8 Q. B. 595), and that does not touch this case, for it proceeded on the fact that for a day or two there were no legal means of ascertaining what was the amount of duty; and the Court, quoting an old case, said (p. 608,) "A duty *impossible* to be known can be no duty; for, civilly, what cannot be known to be is as that which is not." Here the duty itself on each gallon was known; the number of gallons was as much a matter of evidence as the number of quarters of wheat in *Barrow v. Arnaud*.

So far therefore we think the verdict was not against law or evidence, and that there was no misdirection in leaving the case to the jury as one in which, if established in point of fact, the liability in point of law was clear.

The second objection has not, in our opinion, any solid foundation, treating it as directed against the sufficiency of the evidence to go to the jury upon the questions of fact set forth.

The 83,000 gallons (stating the quantity in round numbers) which were represented to be on hand on the 1st of September, 1864, and the "something like" 400 puncheons which were represented to be Reid's property, were excluded from the claim to duties. Allowance was also made, as we

understand, for the 221 puncheons said to have been in store in Montreal. Independently of these quantities, it was proved by Arnold that he sold as agent for the defendant between the 1st of September, 1864, and 1st of July, 1865, 409,465 gallons of spirits, a quantity exceeding the number of gallons entered on the credit side of the defendant's stock book, and on which duties had been paid, by 159,608 gallons. A number of such invoices as were produced represented these sales to be by defendant's firm; they were dated at Maitland, and the spirits were stated in them to be 50 over proof. It was not shewn nor even suggested that the spirits were not of that strength. Had they not been so, it is impossible to believe some of the purchasers would not have complained, and Arnold have become aware of it. The defendant, through Arnold, represented the spirits were of that strength, and such representations are at least *prima facie* evidence against him. Moreover, Arnold swore the defendant conveyed large quantities of spirits to him direct, and it may be gathered from the evidence that deliveries were made direct to the purchasers direct from the Grand Trunk Railway, or other conveyance by which they were sent by defendant. Arnold did not pretend that he stored them in Montreal. We think these several matters afforded ground for the jury to infer, in the absence of explanatory or contradictory evidence from the defendant, as their verdict shews they have inferred. It was competent for defendant to prove, and the fact must have been peculiarly within his knowledge, that if these spirits were manufactured by himself, the duties on them had been paid; or if he had procured them elsewhere, to prove whence. The same observation applies to the proof of strength. We think the evidence given was relevant, and that it was sufficient for the inference the jury have drawn.

The next objection is that of misdirection, and several particulars are stated. As to those which object that the jury were told to find what quantity of spirits the defendant had in his possession, and upon what quantity he had paid duty, and that he was liable to pay duty upon the difference

between these quantities, without other proof that he had manufactured them; that they were told that when spirits were shewn to have been in his possession, or to have been sold by him, the burden of proving the duties were paid thereon was on him, and that if he gave no such proof he was liable; that if they were satisfied he had in his possession the quantities sold by his clerk, that was *primâ facie* evidence that he manufactured them—we need not repeat what we have already said. If the conclusions we have stated are well founded, they answer these portions of the complaint of misdirection.

There is, however, the further objection taken at the trial, that the learned Judge charged the jury that the non-production by the defendant of his books was strong presumptive evidence against him, and that the burden of proof was on him.

On the latter part of this objection we have said all we think necessary; the former part requires some observations. As put in the rule, the objection represents that the learned Judge told the jury this was a presumption of *law*. It would not otherwise be the foundation of a complaint for misdirection.

The report of the learned Judge does not warrant this objection. It shews that he commented strongly on the absence of the defendant's books, which it appeared from the evidence he had kept, and which, though called upon by notice to produce, he had withheld; and he stated to the jury that the omission to produce his books was a presumption to his disadvantage. He did not, according to his report, state in words that it was a presumption of law, or of fact, or of mixed law and fact. But, as he has reported to us, he offered to recall the jury in order to remove from their minds any possible misapprehension, and this offer was declined by the defendant's counsel. As we have already said, the rule must be held as representing that it was treated as a presumption of law.

I can only say that the Court must rely implicitly on the report of the Judge who tries a cause. I said what I felt was necessary as to the impressions or recollections of coun-

sel when conflicting with the Judge's report, at the time this rule was argued. I felt both surprise and regret, not because of the language addressed to the Court, for it afforded no ground for reasonable exception, but at the obvious motive which influenced what was said.

The present case, in one particular at least, finds a parallel in that of *Sutton v. Devonport*, as reported in 27 L. J. C. P. 54. A testator's competency was disputed, and the defendant, after proving that the testator had given a reasonable account of the real property left to him by his father, offered in confirmation of such account to put in the father's will. Its admissibility was objected to on the part of the plaintiff, and it was withdrawn. The Judge (*Cockburn*, C. J.) told the jury they might infer from the plaintiff's objecting to this will being put in, that it was conformable to the statement made by the testator. A rule *nisi* for a new trial was moved, and an exception resembling that now before us was taken to the charge, when the learned Chief Justice exclaimed, "I never dreamed of putting that to the jury as a matter of law." The Court held that what had been said was no misdirection. So here, the production of the defendant's books would have affirmed the sale of 400 puncheons of spirits to Reid, or would have afforded strong evidence that it was a mere pretence, unless the jury had thought that not only such a sale to him, but the subsequent sale of the spirits by Arnold, and the receipt of the price by defendant from Arnold, would all take place without a single entry. It is somewhat worthy of note, that the authority from Reid to deliver spirits consigned to him per G. T. Railway to Arnold bears date the 21st January, 1865. The books would have shewn all the sales of spirits between the days laid in the information; whether any spirits were received by defendant at Maitland or Montreal, and from whom, and how disposed of. They could not but either establish or materially help in establishing the truth upon the matters in issue; and the refusal to produce forms a proper subject of comment to the jury, and of statement to them of the presumptions as to what they would prove if produced.

It is no new doctrine. In *Roe v. Harvey* (4 Burr. 2484), Lord Mansfield said, in civil causes the Court will force parties to produce evidence which may prove against themselves, "or leave the refusal to do it (after proper notice) as a strong presumption to the jury."

So in *The Attorney General v. The Dean of Windsor* (24 Beav. 679), it is said there is a presumption against persons who keep back a document, and against them the evidence is to be taken most strongly.

Mr. *Taylor* (Tay. Ev., sec. 102, 4th ed.), after adverting to the legal effect of such non-production, observes, "Such conduct, in the absence of all excuses, is calculated to produce in the minds of the jury a very prejudicial effect against any person having recourse to it; and if such person be charged with fraud or other misconduct, and the production of his papers would establish his guilt or innocence, the jury will be amply justified in presuming him guilty from the unexplained fact of their non-production." Again, in sec. 729, he says, "The suppression of documents is an admission that their contents were deemed unfavorable to the party suppressing them." And again (sec. 363), after stating the rule that the best evidence of which the case is in its nature susceptible should always be presented to the jury, he remarks, "It is adopted for the prevention of fraud, for when better evidence is withheld, it is only fair to presume that the party has some sinister motive for not producing it, and that, if offered, his design would be frustrated." He refers, among other cases, to that of *Clifton v. Howard*, in the Supreme Court of the United States (4 Howard, 242), where the following passage occurs in the judgment, "Under these circumstances the claimant was called upon by the strongest considerations, personal and legal, if innocent, to bring to the support of his defence the very best evidence that was in his possession or under his control. The evidence was certainly within his reach, and probably in his counting-room, namely, the proof of the actual cost of the goods at the place of exportation. He not only neglected to furnish it, and contented himself with the weaker evi-

dence, but even refused to furnish it on the call of the Government; leaving, therefore, the obvious presumption to be turned against him, that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defence."

It seems to us puerile to contend, if these passages are a sound exposition of the question, that it is not the duty of the Judge to tell the jury so, and to point out to them, that just in proportion to their conviction that the books or documents in the possession of one of the parties contain proof of the transactions they are investigating, and would, if produced, remove all reasonable doubts which of them is right, is the strength of the presumption they may entertain against that party if he withholds them. To tell a jury that a refusal to produce such books, &c., as were called for in this case entitled the Crown, as a matter of law, of legal right to a verdict, would have been wrong; it would have amounted to taking the case out of their hands; but to say to them that such refusal furnished a strong presumption against the defendant, was only what the authorities agree in affirming as the proper view of such conduct. The presumption is to be left to the jury; it is for them to decide on it.

We conclude, therefore, that that objection is unfounded.

We ought, perhaps, to notice another objection, which, though not specifically raised by the rule, was taken at the trial, and spoken to on the argument, namely, that sub-section 2 of section 14 of 29 Vic., c. 3, was improperly held to have what was termed a retrospective operation. We take the principle to be, as expressed by Kindersley, V.C., in *Evans v. Williams* (11 Jur. N. S. 256), that the Court will not put an interpretation upon an act to give it a retrospective effect so as to deprive a man of his right. But this enactment is not of that character; it imposes no new liability, in the proper sense of the word, on the defendant, nor does it take from him any right he previously possessed. It relates rather to matter of procedure, to the course of evidence, and must apply to all trials of those questions which the clause

relates to. The case of *Wright v. Hale* (6 H. & N. 227), is a strong authority on this question.

The last objection is the improper rejection of the exemption of judgment in defendant's favour, on an information filed by the Attorney-General against him, for penalties, first, for not making true entries of the number of gallons of spirits taken from the close receiver and brought into the distillery between the 1st September, 1864, and 1st July, 1865; and, second, for not making true entries of the number of wine gallons of spirits disposed of by the defendant between the same days, claiming, in addition to the penalties, three times the amount of the duties which would have been payable on each number of gallons. As to the first, there is nothing to connect the spirits on which duties are claimed in this case, with spirits taken from the close receiver. The 40th section of 27-28 Vic., ch. 3, suggests the possibility of withdrawing spirits (fraudulently, of course) which have never been in the close receiver; and we fail to see that, though the defendant made true entries of all the spirits he disposed of, that this necessarily proves the duties were paid.

On the whole, we think the rule should be discharged.

Rule discharged (a).

(a) Defendant applied for leave to appeal, but the application was refused.

MITCHELL V. BARRY.

Water Course—Action for obstructing—Injury to Plaintiff's right—Right to recover, though no damage proved.

The plaintiff declared that he was entitled to the water of a certain stream for working his mill, and complained that defendant, owning a mill higher up, had unlawfully deposited sawdust, bark, &c., in the stream, which was carried down and choked up the plaintiff's mill pond and races, &c. Defendant by his second plea denied the plaintiff's right to the water, which the plaintiff sufficiently proved, but there being no appreciable damage, the jury found a general verdict for defendant.

Held, that there must be a new trial, for the right being established, the deposit of sawdust, &c., was an injury to it, for which the plaintiff was entitled to a verdict.

When an act done would be evidence against the existence of a right, it is an injury to such right, for which the party injured may sue.

THE declaration stated that the plaintiff was possessed of certain land and a water grist-mill, water-wheel, head-race and tail-race, in the township of Pickering, and near to a certain water-course and stream, and was entitled to the benefit of the water of the said water-course for the working the said mill, and ought to have been supplied with a fall of water flowing down and along the bed and channel of the said stream into a certain millpond of the plaintiff, formed by a weir or dam of the plaintiff, erected across the said stream, and out of the said pond along the said head-race, and upon and over the said water-wheel, and thence into and along the said tail-race, and from thence into the bed or channel of the said stream belonging to the plaintiff, immediately below the said weir and tail-race; which fall of water, by means of the mill-pond, head-race, weir, and tail-race, until the committing of the grievances, &c., was of right used by the plaintiff for the working his mill: that defendant was possessed of a saw-mill on the said stream higher up than the plaintiff's mill; yet the defendant on divers days, &c., unlawfully placed and deposited and caused to be placed and deposited into the bed and channel of the said stream, and upon the banks and sides thereof, near the defendant's mill, large quantities of sawdust, slabs, bark, wastewood and refuse of his mill, whereby the said sawdust, &c., fell and were washed, blown and carried down the said

stream, along the channel thereof, into plaintiff's mill-pond, and his head and tail races, and into and upon the plaintiff's part of the bed and channel of the stream, below the weir and tail-race, whereby the said mill-pond and races on the plaintiff's part of the bed of the stream, below the weir and tail-race, were filled and obstructed by the said sawdust, &c., and the fall of water to the plaintiff's mill, for the working of his mill, was greatly diminished; that heretofore, and whilst the plaintiff was so possessed, &c., and whilst defendant was so possessed, &c., and before the commencement of this suit, the plaintiff gave notice to defendant, and requested him to remove the said obstructions and prevent the continuance of the said grievances; yet defendant did not, &c., and the plaintiff was hindered from working and using the said mill and fall of water, &c.

Pleas.—1. Not guilty. 2. Traversing the plaintiff's right to enjoy the benefit and advantage of the water of the said water-course for working of the said mill. Issue.

The trial took place at Whitby, in October last, before Morrison, J.

The substance of the plaintiff's evidence was to shew that there was a gradual accumulation of sawdust and other refuse which came down from defendant's saw-mill, and was deposited in the mill-pond principally, though some small quantity also seemed to have found its way, mixed with mud and sand which washed in from the natural banks of the pond and stream, into the head race of the plaintiff's mill. The evidence scarcely warranted the conclusion that there was any appreciable damage from this latter cause, for which the defendant could be made liable; at all events, the damage actually sustained by the hindrance of the working of the mill was not so proved as to afford the foundation for a verdict for more than nominal damages, and as regarded the deposit in the plaintiff's mill-pond, there was no foundation whatever for more than nominal damages.

The jury found for defendant generally.

Robert A. Harrison, in Michaelmas term, obtained a rule

nisi for a new trial, on the ground that the verdict was contrary to law and evidence and perverse; and for misdirection, in charging the jury to find a verdict for defendant, unless the plaintiff was proved to their satisfaction to have sustained substantial damage, and refusing to tell them that if the plaintiff had the right to the flow of water in a state of nature, the interference of the plaintiff with that right, if established, entitled the plaintiff at least to a verdict for nominal damages, although no special damage was proved; for the repetition of the unlawful act, if uninterrupted and undisturbed, will lay the foundation of a legal right.

M. C. Cameron, Q. C., shewed cause, citing *Frankum v. Earl of Falmouth*, 2 A. & E. 452; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Dickinson v. The Grand Junction Canal Co.*, 7 Ex. 299.

Harrison, in support of the rule, cited *Wood v. Waud*, 3 Ex. 748; *Embrey v. Owen*, 6 Ex. 353; *Rochdale Canal Co. v. King*, 14 Q. B. 135; *Bickett v. Morris*, L. R. 1 Sc. & Div. App. 47; *Watson v. Perine et al*, 13 C. P. 229 *Addison* on Torts, 58.

DRAPER, C. J., delivered the judgment of the Court.

If this general verdict for the defendant involved no other question or consequence than the claim to small damages and the refusal of the jury to award them, we should be prepared to discharge the rule at once.

But the second plea put in issue the plaintiff's right to the water of the stream for the working of his mill; and the jury, as the verdict is taken, have found against the plaintiff upon that question, and, as appears to us, improperly.

If this denial of the plaintiff's right to the use of the water is sustained, then the defendant may apparently continue to allow sawdust and mill-refuse to pass from his saw-mill into the stream and so into the plaintiff's mill-pond, and sooner or later a continuous deposit of this character at the bottom of the pond will diminish the space for holding water, and so diminish the volume of water kept back by

the dam or weir, for the working of the mill. In time, the injury, not now appreciable, will become serious, while twenty years' enjoyment without interruption will afford evidence of an easement in the owners of the defendant's saw-mill, to deposit sawdust, &c., on the plaintiff's land, and thus the owners of the plaintiff's grist mill will be remediless, when the injury becomes severely felt.

This plaintiff's counsel objected at the trial to the learned Judge's charge, because he directed that unless the plaintiff proved he had suffered damage the defendant was entitled to a verdict on the first issue. In the rule this objection is amplified into a statement that the learned Judge charged the jury to find for the defendant unless the plaintiff was proved to their satisfaction to have sustained substantial damages, and refused to tell them that if the plaintiff had the right to the flow of water in a state of nature, the interference with that right, if established, entitled the plaintiff to at least nominal damages. The learned Judge's report affords no colour for this amplification, but it shews that the jury, when they rendered a general verdict for the defendant, stated in answer to a question that they did not consider the second issue. Still if judgment be entered on the general finding on the record, it will greatly embarrass if it will not wholly bar an action, when this apparently continuous deposit in the plaintiff's mill-pond does create serious loss and damage.

Now if the plaintiff has the right to the water of the stream for the working of his mill, and we think there was sufficient evidence to sustain it, then the deposit of sawdust in the bed of the stream, or in the mill-pond, which according to one witness includes the bed of the stream, is an injury to the right, even though the plaintiff had lost nothing in the working of his mill. In *Nicklin v. Williams* (10 Ex. 259) during the argument, Parke, B. says, (p. 267): "Whenever an act done would be evidence against the existence of a right, that is an injury to the right, and the party injured may bring an action in respect of it." And although *Nicklin v. Williams* was not upheld (see *Bonomi*

v. *Backhouse*, in appeal, (E. B. & E. 646) and *Backhouse* v. *Bonomi*, In Error (7 Jur. N. S. 800, in Dom. Proc.), yet the principle above stated is neither shaken nor questioned.

It appears to us therefore there must be a new trial, with costs to abide the event.

Rule absolute.

MEMORANDA.

During this term the following gentlemen were called to the Bar:—GEORGE PETER LAND, WILLIAM HENRY WALKER, EDWARD MERRILL, FREDERICK THOMAS JONES, HENRY WETENHALL, JAMES HARSHAW FRASER, FRANCIS COLLIER DRAPER, GEORGE LEFROY McCaul, CHARLES SEAGER, JAMES WATT, JOHN MUDIE, WILLIAM LYNN SMART, JAMES GRAYSON SMITH.

In the Court of Queen's Bench and the Court of
Common Pleas.

REGULÆ GENERALES.

"Hilary" Term, 30th Victoria.

IT IS ORDERED,—That the following rules shall come and be in force in the Courts of Queen's Bench and Common Pleas, from and after the last day of this present Hilary Term :—

1. In "Easter" and "Michaelmas" Terms, the first Friday, the second Monday, the second Wednesday, and the third Monday, will be "PAPER DAYS" in the Court of Queen's Bench; and the first Saturday, the second Tuesday, the second Thursday, and the third Tuesday, in the Court of Common Pleas.

2. County Court Appeals must be set down for argument for the first or second Paper Days of each Term, such day being the first Paper Day next after the date of the Appeal Bond, unless leave be granted by the Court, upon special affidavit, to set it down for a subsequent Paper Day; and the Court will hear County Court Appeals on the first and second Paper Days of each Term in preference to the other cases set down upon the Paper.

3. On the last Tuesday and Friday in "Easter" and "Michaelmas" Terms, the Court of Queen's Bench, and on the last Monday and Wednesday, in the said Terms, the Court of Common Pleas, will take the New Trial Paper, and proceed therewith, in like manner as on the other days appointed by Rule of Court for that purpose.

Dated 12th February, A.D. 1867.

(Signed)

WM. H. DRAPER, C.J.

WM. B. RICHARDS, C.J., C.P.

JOHN H. HAGARTY, J., Q.B.

JOS. C. MORRISON, J., Q.B.

ADAM WILSON, J., C.P.

JNO. WILSON, J., C.P.

Certified

L HEYDEN,

Clerk of the Crown and Pleas.

IN THE COURT OF ERROR AND APPEAL.

CLISSOLD V. MACHELL AND MOSELY.

Trespass—Several defendants—Separate damages—Exemplary damages.

Held, affirming the judgment of the Court of Queen's Bench, that it was no ground for a new trial in an action of trespass against two defendants, that the jury had found separate damages, \$800 against one defendant, \$400 against the other.

Quære, as to the proper mode of entering judgment on such verdict.

Held, also, one of the defendants having used insulting expressions to the plaintiff while being examined before him as a magistrate; that the learned Judge was justified in telling the jury they were at liberty to give exemplary or vindictive damages.

APPEAL from the judgment of the Court of Queen's Bench in this case, reported in 25 U. C. R. 80,¹ where the facts are fully stated.

The plaintiff sued two defendants, magistrates, declaring in the first count for trespass and false imprisonment, and in the second in case, for the same imprisonment, charging that it was done maliciously and without reasonable or probable cause.

The jury being told by the learned Judge that they might discriminate between the two defendants, found \$800 damages against one, and \$400 against the other, and the Court held that this formed no ground for setting aside the verdict, whatever might be its effect as regarded the entry of Judgment. They also held that, under the circumstances of the case, the learned Judge at the trial was justified in telling the jury that they were at liberty to give exemplary or even vindictive damages.

The defendant Machell, against whom the larger damages had been given, appealed, on the ground that the Court should have set aside the verdict for misdirection,—

1. In telling the jury that they might assess several damages against two defendants in an action of trespass.

2. In telling the jury that they ought to give damages *in pœnam*.

3. That they should have awarded a trial *de novo*, on the ground of a miscarriage in the verdict.

Anderson, for the appellant (*a*). Sir John Heydon's Case, 11 Co. 5 *a*, is a clear authority that such a finding is a ground for a *venire de novo*. *Rodney v. Strode* (Carth. 19) only shews that it is not ground of error. If the plaintiff had entered a *nolle prosequi* as to one at the trial, he might have cured the defect, but having allowed the verdict to stand till a motion was made for a *venire de novo*, he is too late to prevent such trial. There is a distinction between the finding being ground of error and being the ground for a motion for *venire de novo*. The case in Carthew could not have intended to decide that this was not ground of *venire de novo*, otherwise it would have overruled a well considered case in Coke, Sir John Heydon's Case, without alluding to it. In *Mitchell v. Milbank* (6 T. R. 199), counsel for plaintiff preferred setting aside their own verdict on payment of costs. The cases cited in the Court below on the point of damages *in pœnam* only establish that the jury may take all the circumstances into consideration, so far as they affect the plaintiff, for the purpose of enhancing the damages, but not that they may blend the injury to the public with that to the plaintiff, and teach the defendant a lesson; such a course has been dissented from by most Judges. The question is fully discussed in the Appendix to *Sedgwick on Damages*.

K. McKenzie, Q. C., contra.

On the 14th March, 1867, the following judgments were delivered:

(*a*) The case was argued on the 30th January, 1867, before Draper, C.J., VanKoughnet, C., Richards, C. J., Hagarty, Morrison, Adam Wilson, J. Js., and Mowat, V. C.

VANKOUGHNET, C.—I think the judgment of the Court below right, and that this appeal should be dismissed with costs. It will be for the plaintiff so to take his judgment as to avoid ground for a writ of error, which it seems to me would lie were he to enter up judgment for separate damages against the two defendants severally, in respect of the joint trespass or wrong charged against them. I take it that he may elect to proceed against both for the smaller sum rendered by the jury, or abandon the one defendant and proceed against the other for the damages awarded against him. This, however, the plaintiff must himself look to.

I do not think that the learned Judge's charge to the jury, as I understand it, in directing them that they might give exemplary or vindictive damages, was wrong. So far as I can perceive from the statement of defendant's counsel, the most that it amounted to was that if the defendants, or either of them, abusing the position of the magistrate, and either knowing their powers or in ignorance of them, intended to inflict a wrong upon the plaintiff, or maliciously to punish him, or by the use of unnecessarily harsh language to wound his feelings, the jury might take this into consideration, in awarding damages. The magistrate, having no legal right to act as he did, cannot complain that the jury shall enquire into the motives which influenced him, in order that they may fix the damages which he should pay. I think such a case one of all others in which such an enquiry is proper, whenever there is evidence to warrant it. Magistrates often have it in their power to gratify their own vindictive feelings against a neighbour charged before them with an offence, and it is highly important for them to understand that for this they may be punished, particularly in this country, where so many are anxious to be magistrates, and their desires are so readily complied with. It might be worth while for some of these gentlemen to consider how far they are competent for their much coveted position, and whether they do not gain more trouble than honour by it.

DRAPER, C. J., adhered to his opinion in the Court below.

RICHARDS, C. J.—I am of opinion this appeal should be dismissed with costs.

There is no doubt the general rule is, that in actions of trespass against two or more persons for a joint trespass, where a joint trespass is proven, the damages should be assessed against all the defendants; but when there appears to be a different course of conduct pursued by each defendant, and their motives seem different, an assessment of damages might do great injustice to one and be perfectly right as to the other.

In *Clark v. Newsam* (1 Ex. 131), at *Nisi Prius*, the learned Chief Baron Pollock told the jury, "that in cases of joint assault it was usual to assess the damage as against the most guilty party; but when the question was as to the motives of the parties, the jury ought to act on a different principle, and assess the damages according to the acts of the most innocent party." In giving judgment, the same learned Judge said, "It is difficult to say that there are no cases in which the motives of the parties would be important; still I think it would be very unjust to make the malignant motive of one party a ground of aggravation of damage against the other party, who was altogether free from any improper motive. In such a case the plaintiff ought to select the party against whom he means to get aggravated damages." Alderson, Baron, said: "In the case of a joint trespass, the true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass. We ought to look and see what each has done, and what injury has been sustained from each. Where two persons have a joint purpose, and thereby make themselves joint trespassers, and the one beats violently, and the other a little, the real injury is the aggregate of the injury received from both. So, if a motive be taken into consideration, the motive of A. may be most aggravated, and the motive of B. most mitigated, then the damages must be regulated accordingly." Baron Rolfe said, "When two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act."

In the case then under discussion, the damages given were but nominal, one of the defendants having acted without any improper motive, but the Court granted a new trial, as the jury might have thought the damages should be such as should be given against the least guilty of the two defendants, whereas the plaintiff was entitled to compensation in proportion to the injury he had received.

I think the Chief Baron has shadowed forth the course the plaintiff ought to take when there are different degrees of aggravation; viz.: select the party against whom he means to get the aggravated damages.

When must he make the selection? According to the defendant's contention, before he brings the action, or at all before the verdict is recorded.

It may be difficult to do that before the action is brought, for much may occur at the trial to shew that the plaintiff's preconceived notions of the case are incorrect, and at the trial the evidence may be of that character that it is difficult to say how far the jury may give effect to the evidence of the plaintiff; and when all is done, and the plaintiff himself contends that he should have equally large damages against all the defendants, the jurors themselves may discriminate, and find larger damages against one defendant than against another; and unless the verdict is to be rejected entirely, the same difficulty would follow in this last case that would flow from the jury being told they might discriminate.

If different damages are assessed against the different defendants, and the plaintiff may afterwards enter his judgment for the damages assessed against one, and enter a *nolle prosequi* as to the others, then that seems to go far to settle the question of allowing the jury to assess separate damages.

The case of *Rodney v. Strode* (3 Mod. 101), is expressly on the point, and is said to have been confirmed both in the Exchequer Chamber and the House of Lords, for the defect of the verdict was cured by entering the *nolle prosequi*.

Hill et al. v. Goodchild (5 Burr. 2790), was a writ of error brought on a judgment that had been entered up against two, where the damages were assessed separately, and for separate

amounts against each of the defendants, and it was there held that this was error; but there was no *nolle prosequi* entered there as to the other defendant.

The course taken in *Rodney v. Strode* still seems the proper one to pursue. It is laid down in Mayne on Damages, at p. 330, "Where damages are assessed severally instead of jointly, judgment will be reversed; but the plaintiff may cure it by taking judgment *de melioribus damnis* against one and entering up a *nolle prosequi* against the other, and this whether they have joined or severed in pleading." In the last edition of Chitty's Archbold, p. 1514, it is laid down as follows:—"Also, if the jury, in an action of trespass, sever the damages where they should not, the plaintiff may take judgment *de melioribus damnis* against one of the defendants, and enter a *nolle prosequi* as to the other."

As to the misdirection complained of, no doubt much may be said as to Courts of justice not being established for the purpose of *teaching* parties in civil actions what they ought to do, by giving damages to their opponents beyond what would compensate them for the injuries they have received by the illegal conduct of the defendants. Though the defendants may deserve punishment, that is no reason why the plaintiffs should reap a reward beyond a fair indemnity, in consequence of the bad conduct of the former.

Nevertheless, the almost universal practice seems to have been to impress on jurors the necessity of making examples of parties who have misconducted themselves, by giving large damages (when the circumstances were such as to call for aggravated damages) to deter others from committing like offences, and to prevent the defendants themselves from again committing a similar outrage. These remarks undoubtedly have generally emanated from the bar, and when pressed unduly or improperly, they have been counteracted by the observations of the Judges; but in a proper case for them the Judge seldom or ever interferes, and I think it would be difficult to find a case in which such refusal to interpose would be considered a ground for disturbing a verdict. When the Judges consider it necessary to call the attention of jurors

to the conduct of parties with a view of giving large damages, they do not seem to have hesitated to do so.

In *Emblen v. Myers* (6 H. & N. 54), referred to in the judgment of the Court below, the learned Judge in charging the jury said, "If they were of opinion that what was done by the defendant was done wilfully, with a high hand, for the purpose of trampling on the plaintiff and driving him out of possession of the stable, they might find *exemplary* damages."

Pollock, C. B., said "If the injury was committed in an insolent way, the jury might take into consideration the motive, and give exemplary damages;" and in giving judgment he said, "The Courts have always recognized the distinction between damages given with a liberal and a sparing hand; and since the language of this declaration is such that it may be read as charging a wilful wrong, and as it appears that the wrong was accompanied with expressions of contempt, I think that the direction of the learned Judge was correct."

In the case of *Bell v. The Midland Railway Co.* (10 C.B. N. S. 306), also referred to in the Court below, *Emblen v. Myers*, was approved of by Willes, J.; and Byles, J., said, "I agree with my brother Willes, that where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into their consideration, and giving retributory damages." See also *Skull v. Glenister*, (33 L. J. C. P. 185).

We are not at present informed as to the mode in which the plaintiff may choose to enter up his judgment. Perhaps he may content himself with taking judgment against both defendants on the first count of his declaration, for the smaller sum, assessed as damages against the defendant Mosely; or he may enter his judgment against both defendants in the same way on the other count; or he may take judgment against the appellant alone for the amount of the verdict against him, entering a *nolle prosequi* against Mosely.

It would, I think, under any circumstances, be very inconvenient to determine the question of whether the proceedings

of the plaintiff are regular or not as to any judgment he may enter, on the motion for a new trial. If there should be error in the judgment, it ought to be brought up on a proceeding in error strictly, and not on this motion. That seems to have been the mode in which the counsel in *Gregory v. Slowman*, (1 E. & B. 371), anticipated the difficulty would arise in that case if a *nolle prosequi* were entered.

On the whole, I think the judgment in the Court below was right, and this appeal must be dismissed with costs.

HAGARTY, J.—I concur in dismissing this appeal, but I express no opinion as to how the plaintiff should enter his judgment, or what the effect of a writ of error may be.

ADAM WILSON, J., JOHN WILSON, J., and MOWAT, V. C., concurred.

Appeal dismissed.

EASTER TERM, 30 VICTORIA, 1867.

May 20th to June 8th.)

Present :

THE HON. WILLIAM HENRY DRAPER, C.B., C.J.

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

IN RE DARTNELL AND THE COURT OF GENERAL QUARTER
SESSIONS OF THE PEACE FOR PRESCOTT AND RUSSELL.

Clerk of the Peace—Fees.

The table of fees established and promulgated by the Courts contains all the services for which Clerks of the Peace are entitled to charge, in addition to such as are specially authorised and provided for by any statute. No local tariff or user in particular counties can give any additional right. Where the Quarter Sessions have audited the account of such Clerk, this Court will not interfere by mandamus to compel the allowance of particular items.

In Michaelmas Term *Hector Cameron*, on behalf of the applicant, who is Clerk of the Peace for the United Counties of Prescott and Russell, obtained a rule calling upon the Court of General Quarter Sessions of the Peace for those counties, to shew cause why a mandamus should not issue, commanding them to audit and allow to the applicant, as Clerk of the Peace and County Crown Attorney, the several charges annexed to the rule and to the affidavit of the applicant, or some or any of them, and such an amount respectively therefor as might be adjudged, on the ground that the applicant holding those offices was entitled to those charges.

The applicant was appointed by commission, dated 4th February, 1865.

Under the 8 Vic., ch. 38, the Justices in General Quarter Sessions had framed a table of fees for all services rendered in the administration of justice, and for other District purposes, by (among other officers) the Clerk of the Peace, which services were not then remunerated. Under the same statute the Court of Queen's Bench, in the Michaelmas Term in the same year, having this and similar tables of fees furnished by the other Courts of Quarter Sessions in Upper Canada, framed a table of fees for the use and direction of all these courts, as to the allowances to be made to the different officers named in the statute.

By the Consolidated Statute U. C., ch. 119, sec. 2, the table of fees theretofore framed by the Justices of the Peace, and confirmed by the Queen's Bench, was continued until otherwise appointed; and the Superior Courts of Common Law were authorised from time to time, as occasion might require, to appoint the fees, as they had done before. Both acts contained a provision that nothing herein contained should deprive any of the officers named of any fees that were allowed by any act of parliament for other services not provided for under these enactments.

In Trinity Term, 26 Vic., the Judges of the Superior Courts made a rule substituting a new table of fees for the Clerks of the Peace, in lieu of that established by the Queen's Bench in 1845.

All the charges made by the applicant were for services rendered since this last table of fees was promulgated.

During this term *Richards*. Q.C. shewed cause, and *Hector Cameron* supported the rule.

Askin v. London District Council, 1 U. C. R. 292; *Corporation of Lambton v. Poussett*, 21 U. C. R. 473; *Poussett and the Quarter Sessions of Lambton*, 22 U. C. R. 412, were referred to.

DRAPER, C. J.—The Clerk of the Peace is entitled to fees for services in all cases where such fees are authorized by Act of Parliament, and in all cases provided for in the table promulgated by the Courts in September, 1862. We do not

think he can lawfully claim fees for any other services rendered by him.

A large part of the claim advanced upon this application is rested upon the authority of what is called the local tariff, and upon user, either before or since that tariff was prepared, which, as stated in the applicant's affidavit, was made on the 1st July 1845, by the Quarter Sessions, in compliance with the statute 8 Vic., "and which," as he affirms, "was ordered to be established and to come into force from and after those sessions." He adds that this table of fees appears to have been since hitherto acted upon in these counties in certain matters where its provisions have not been varied by the Judge's table or by statutes.

We think that one of the objects of the acts in question was to introduce a uniformity of system in regard to the different services in the administration of justice, or for other county purposes, both as to the services for which fees were chargeable and as to the amount. For this purpose each Court of Quarter Sessions was required to frame a table of fees, and to transmit to the Queen's Bench, and that Court was from time to time, and as occasion required, to appoint what fees should be taken. The only fees with which the Court was not to interfere were such as were allowed by any Act of Parliament for other services than those to which the statute referred—in the administration of criminal justice and other county purposes. So soon, therefore, as the Court established a table, it superseded that framed by the several Courts of Quarter Sessions.

The auditing the accounts of the Clerk of the Peace devolves upon the Court of Quarter Sessions, seven Justices at least being present (Consol. Stat. U. C., ch. 121, sec. 2). In the present case three Reeves of municipalities in the counties formed part of the auditing body. They audited the applicant's account, and refused to allow certain items. The object of this application is virtually to get this Court to revise this audit or taxation, first, by allowing for services not included in the table of fees established by the Courts; second,

by fixing the fee for such services, if not already legally settled.

In re Poussett (22 U. C. R. 412), a somewhat similar application was made. It does not appear, however, that the charges for the audit whereof the applicant there sought a mandamus had been disallowed on the audit of an account containing other items which had been allowed, though probably it was so. Here that fact is clear, and in this view the application is not so much to compel the Quarter Sessions to audit the account, as to allow certain charges upon such audit. The Court of Quarter Sessions have audited the account of the applicant, allowing him, as we understand, the appointed fees for all services directed or recognized, either by express enactment, or by the table of September, 1862. This appears to us strongly to savour of a judicial determination in a matter within their jurisdiction; and if it be not so, we must protest against this Court being converted into a taxing office to revise taxation of costs by an inferior tribunal.

As, however, we have granted the rule, and no objection was raised against our entertaining an application of this particular nature, we will not withhold the expression of our view of the claim.

We think the table of fees established and promulgated by the Courts contains all the services for which the applicant as Clerk of the Peace is entitled to charge, in addition to such as are specially authorized and provided for by any statute; and that neither the local tariff spoken of, nor any usage that is proved, give any additional right.

This intimation of opinion will furnish a guide for the audit of the complainant's accounts. If there are services for which it would be right to allow fees, and which are not provided for in the present table, and if the different Courts of Quarter Sessions, or a considerable part of them, concur in recommending the formation of a new table by the Superior Courts, in order to include such services, we should not be indisposed to take the matter up.

We are of opinion this rule must be discharged, but without costs.

HAGARTY, J.—No doubt the Clerks of the Peace do a great deal of work for nothing, but that we cannot help. Poussett's case was a hard one, and so is this. The difficulty is, that much of the routine business which formerly made the office remunerative has been done away with, and more of it given to other officers by the municipal acts, and this has made the office of Clerk of the Peace in some counties hardly remunerative to a man of education and intelligence.

MORRISON, J. concurred.

Rule discharged.

HAMMOND v. McLAY.

Registrar—Tenure of office.

Defendant was appointed Registrar in 1859, under 9 V., c. 34, by which the Governor is authorised in general terms to appoint, and provision is made for removal on certain contingencies, to be proved in a specified manner. His commission conferred upon him the office, with all the rights, &c., thereto belonging, but expressed the appointment to be during pleasure. In 1864 he was removed, and defendant appointed, the admitted cause of such removal being alleged misconduct as returning officer at an election.

Held, that by the statute the plaintiff was subject to removal only for the reasons and by the means there provided; that the words "during pleasure," in his commission, could not deprive him of his statutory rights; that the 29 V., c. 24, passed after defendant's appointment, by which every Registrar then in office was continued therein, would not confirm such appointment if illegal; and that the Interpretation Act, providing that a power to appoint shall include power to remove, could not apply.

The plaintiff therefore was held to be still Registrar, and entitled to the fees of such office received by defendant.

THE declaration contained two counts. The first for money payable by defendant to plaintiff for fees and emoluments received by defendant due and of right payable to the plaintiff as Registrar of the County of Bruce. The second, the common count for money had and received.

Pleas.—1st. Never indebted; 2nd. That the plaintiff was not Registrar of the County of Bruce at the time the fees and emoluments mentioned in the first count were received by defendant.

Issue thereon.

The case was entered for trial at the Autumn Assizes, at Goderich, before Hagarty J., when a verdict was entered for the plaintiff, with leave reserved to defendant to move to enter a nonsuit, or a verdict for himself, upon certain admissions then made.—

The following were the admissions made for the purposes of the trial:—

1. That by commission under the Great Seal of the Province, bearing date 13th June, 1859, the plaintiff was appointed to be Registrar for the County of Bruce “during our pleasure” and his residence in the county, together with all the rights, privileges, emoluments, fees and perquisites to the said office belonging or of right appertaining; and the town of Southampton was named as the place where the registry office was to be kept.

2. That on the 14th July, 1859, the plaintiff entered into the necessary recognizance with two sureties (approved by two Justices of the Peace) conditioned for the due performance of the duties of his office, and took the necessary oath of office and of allegiance, all of which were duly filed of record with the Clerk of the Crown in the Court of Queen’s Bench, on the 21st September, 1859.

3. That the plaintiff accepted the said office, and continued to discharge the duties of it until as hereinafter mentioned.

4. That by letters patent under the Great Seal of the Province, bearing date the 26th February, 1864—after reciting the letters patent of the 13th June, 1859, and that Her Majesty had been pleased to determine her Royal will and pleasure in relation to these letters patent—Her Majesty did cancel, revoke and make void the said letters patent, and did thereby discharge the plaintiff from the said office of Registrar.

5. That such discharge was grounded upon facts set forth in certain correspondence produced and put in as evidence, and not for any of the causes mentioned in secs. 66 or 67 of Consol. Stat. U. C., c. 89, or upon any presentment or conviction as in those sections mentioned.

6. By commission under the Great Seal of the Province, dated the 26th February, 1864, the defendant was appointed to be Registrar of the County of Bruce, in the room of the plaintiff, "removed," to hold "during our pleasure" and his residence in the county, together with the rights, &c., (as in the plaintiff's commission.)

7. Notwithstanding the foregoing facts, and disregarding a demand for the registry books which was made by defendant upon the plaintiff, the plaintiff kept possession of those books, and assumed to discharge the duties of Registrar until the 21st June, 1864, when defendant, against the will of the plaintiff, procured possession of the books, and thereafter exclusively continued to act as such registrar.

8. That during the period last aforesaid : viz, from the 26th February, 1864, till 21st June, 1864, defendant also assumed to act as Registrar.

And it was agreed that a verdict be entered for the plaintiff for six hundred dollars, with leave to defendant to move to set it aside and enter a nonsuit or a verdict for defendant, if on the foregoing facts and the documents put in, the Court should be of opinion that the plaintiff was legally dismissed from said office, and defendant legally appointed thereto, or if under the operation of the recent act, 29 Vic., ch. 24, sec. 9, the appointment of defendant was *ex post facto* legalized; either party to be at liberty to avail himself of any point of law fairly arising upon the evidence.

In Michaelmas term, *S. Richards*, Q.C., obtained a rule accordingly, on the following grounds:—That upon the facts admitted the plaintiff shews no right to recover; that the plaintiff was not Registrar of the County of Bruce during the time the said moneys or fees are alleged to have been received by defendant; that if there was any doubt as

to the defendant being Registrar, his appointment is confirmed by the last Registry Act; that if the plaintiff were Registrar during the time the moneys were alleged to have been received, an action will not lie at the suit of the plaintiff for moneys which were paid for defendant's registration of deeds and instruments; that the plaintiff has not shewn any money to have been received by defendant for the use of the plaintiff.

Robert A. Harrison shewed cause, citing *Harcourt v. Fox*, 1 Show. 426; *Hunt v. Coffin*, Dy. 197 *b*; *Rex v. Toly*, Dy. 197 *b*; *Rex v. Blage*, Dy. 197 *b*; Dy. 198 *a*, 198 *b*; *Sir Robert Chester's case*, Dy. 211 *a*; *Kent v. Mercer*, 12 C. P. 30; *Moon v. Durden*, 2 Ex. 22; *Midland R. W. Co. v. Ambergate, &c., R. W. Co.*, 10 Hare 369; *De Winton v. Mayor of Brecon*, 26 Beav. 533; *Pretty v. Solly*, Ib. 606; *Chitty Prerog.* 87.

S. Richards, Q.C., in support of the rule, cited *Chy. Prerog.* 75; *Bac. Ab. Offices. A*; *Smyth v. Latham*, 9 Bing. 707.

The statutes cited are referred to in the judgments.

DRAPER, C. J.—The office of Registrar was first created in Upper Canada by the Stat. 35 Geo. III., ch. 5, which authorised the Governor for the time being to nominate and appoint one sufficient person to hold the office, and to appoint the place where he should be resident. It was provided that in case of a vacancy by death, forfeiture, or surrender of such Registrar, the Justices of the Peace for the county, at the General Quarter Sessions next after such vacancy, should in open Court draw up a memorial of such vacancy, and transmit it to the Governor, by whom within a month after the receipt of the memorial a new appointment was to be made. The Registrar was required to take oath of office, and to give security by a recognizance with two sureties for the due performance of his duties. If he, or his deputy (whom the statute permitted him to appoint) neglected to perform the prescribed duties, or committed or

suffered any undue or fraudulent practice in the office, and were thereof lawfully convicted, he should forfeit his office.

This Act, with some others affecting it, were repealed by 9 Vic., ch. 34. By this statute, which consolidated and amended the previous law, the Governor was authorized to appoint in any new county in Upper Canada a proper person to perform the duties of Registrar, as well as to fill up any vacancy which might occur by death, resignation, removal from office, or forfeiture. The appointment, which had theretofore been made by commission under the hand and seal at arms of the Governor, was thenceforth to be under the great seal of the Province. The Registrar and his deputy were to take an oath of office, and the Registrar was, as before, to enter into a recognizance with sureties.

Upon a full consideration of this statute, under which the plaintiff was appointed, I am of opinion that, notwithstanding in his commission the office was conferred "during pleasure," he acquired and took it during good behaviour, for the statute in my view creates an office of freehold, and the character of the office cannot be changed by the terms of the commission.

The language used in conferring the authority to appoint is general, containing no defined limitation as to the duration of the tenure of office, except that which arises from the death the acts of the officer himself. The statute does not make the tenure dependent on the pleasure of the Governor nor even of the Crown.

There is, further, express provision that under certain circumstances, and after certain proceedings, the tenure shall cease, so that, while the statute says nothing to limit the appointment, it does provide for removal or forfeiture upon some expressed contingencies.

Thus, if any Registrar does not keep his office in the place named for that purpose, or, not having himself a fire-proof office or vault, does not remove to that provided for him by the County Council, he is liable to removal by the Governor on a presentment of the grand jury at the Quarter Sessions, to be founded upon the evidence of two

or more competent witnesses. So also, if the Registrar or his deputy neglect to perform their duty, or commit or suffer any undue or fraudulent practice in the execution thereof, and be thereof lawfully convicted, then the Registrar forfeits his office. And if he ceases to reside within his county, or becomes, by sickness or otherwise, wholly incapable of discharging the duties of his office, the Governor may remove him on presentment by the grand jury, as aforesaid, founded upon the like kind of evidence.

The vacating of the office being provided for on the existence of certain causes, such existence to be established upon evidence and presentment, or conviction founded thereon, it appears to me that the proper inference from the statute is that the Legislature intended the tenure to last until the Registrar violated one or other of these conditions, and such violation was moreover established in the manner pointed out. In my opinion, this is equivalent to declaring that the office is to be held during good behaviour, *i.e.*, so long as the prescribed conditions are faithfully observed.

And so far as the public service in regard to this office is concerned, the tenure during good behaviour is most likely to conduce to the public advantage, for, to borrow Lord Holt's language, in *Harcourt v. Fox* (1 Show. 515), the occupant "will be encouraged to endeavour the increase of his knowledge in that employment, which he may enjoy during life; whereas precarious dependent interests in places tempt men to the contrary."

It will scarcely be urged that by introducing the words "during pleasure" into the commission, the Registrar could be deprived of the protection which the statute gives him, that he must be convicted before he can be said to have forfeited his office, and presented by a grand jury before he is liable to removal. But if not, then for any of those serious omissions or breaches of duty which the statute does provide for, the Governor cannot remove, though the commission is during pleasure, while upon other grounds, and possibly grounds wholly unconnected with his conduct as Registrar, a person holding that office might be summarily dismissed.

I cannot imagine that if the Legislature had contemplated a tenure at the will of the Crown, they would have only limited the exercise of the power of removal in those cases, in which the public interests would have most clearly justified its exercise.

The question seems to have arisen under the former Registry Act of Upper Canada more than fifty years ago. Before the year 1808, David McGregor Rogers held a commission as Registrar of the two counties of Northumberland and Durham. It is, I believe, also the fact that he was in that year, as well as before and perhaps after, a member of the House of Assembly; and it has been suggested that in some way he gave offence, in consequence of which an attempt was made to deprive him of his office of Registrar, the commission for which, both under the statute 35 Geo. III. and that of 9 Vic., has contained the words "during pleasure." And on the 15th March, 1808, a commission issued appointing Thomas Ward, Esquire, Registrar for the counties of Northumberland and Durham. Rogers, however, held all the books and papers, and in Michaelmas term, 49 Geo. III. (November, 1808) the Attorney General, on the part of the King, obtained a rule for the issue of a mandamus (*Nisi* I presume) ordering Rogers to deliver over these books, &c., to Ward. In Trinity term following, on the return of the mandamus, the Attorney and Solicitor General were heard in support of the application for a peremptory writ, and Mr. Rogers appeared and argued against it; and after taking time to consider, the Court of Queen's Bench, (Scott, C. J., and Powell, J.), during the same term refused the application. The entries of these proceedings are minuted in the term book of the Clerk of the Crown, but none of the affidavits or papers are forthcoming. But the preamble to the statute 10 Geo. IV., ch. 8, referred to by Mr. Harrison, recites that the appointment of Mr. Ward was adjudged by the Court of Queen's Bench to be invalid; and having ascertained that his commission was in the usual form, I infer that the ground of the judgment was that Rogers was not removable except for some one of the

causes and in the manner pointed out in the statute 35 Geo. III.—in other words, that he held an office of freehold.

The Interpretation Act (Consol. Stat. C., c. 5, s. 6, 22ndly) is invoked, however, on behalf of the defendant. This enacts that "Words authorizing the appointment of any public officer or functionary, or any deputy, shall include the power of removing him, re-appointing him, or appointing another in his stead, in the discretion of the authority in whom the power of appointment is vested."

This provision must be considered in connection with sec. 3 of the same statute, which makes the interpretation clauses applicable, "except in so far as the provision is inconsistent with the intent and object of such act, or the interpretation which such provision would give to any word, expression, or clause is inconsistent with the context."

Assuming, as I think is shewn, that the language of the Registry Act makes the appointment *quam diu se bene gesserit*, it would be clearly inconsistent with the context to hold that the Governor had a general and unlimited power to remove a Registrar, because the power of removal is in express terms given by the statute, but given with a limitation as to the causes for which it may be exercised, and subject to the establishment of the matter of fact in a particular mode. If the power of removal were in this case to be treated as annexed to the power of appointment, and not as conferred by the Registry Act, the special provisions would be superfluous, and the officer would lose the protection which they were obviously designed to give him. He might be removed *ex mero motu*, without cause assigned at all.

Then the defendant relies on the 29 Vic. ch. 24, sec. 9, by which every Registrar in office when that act came into force (18th September, 1865), is thereby continued therein. The object of that section is primarily to confirm all appointments made in conformity with the pre-existing laws, which were by that act repealed. If the defendant was not lawfully appointed, I do not think this section would operate to confer the office on him; and if the plaintiff was in law the Registrar, though deforced, as it were, from his office, this

section cannot be held to deprive him of his right. And though this act does not require either a presentment by the grand jury or a conviction, yet it expressly (sec. 16) sets forth the causes for which the Registrar may, "at the discretion of the Governor in Council," be dismissed. Probably it will be found that in order to vacate the office, which is conferred by commission under the Great Seal, some proceeding more formal than a mere minute in council may be necessary; but it is unnecessary to consider this, as neither the plaintiff nor the defendant were appointed under the authority of this act, and the validity of the removal of the plaintiff must depend on the former statute.

The only ground suggested as that upon which the plaintiff was dismissed or attempted to be deprived of office, is for misconduct in a duty imposed upon him by an entirely different act of Parliament.

By the election law, passed some years subsequent to the 9th Vic., (Consol. Stat. C. ch. 6), the Registrar is constituted in certain cases *ex-officio* the Returning Officer at elections of members of the House of Assembly; and in sec. 31, sub-sec. 10, sec. 32, and sec. 34, sub-sec. 3, penalties are imposed for the refusal or neglect to perform certain duties imposed upon the Returning Officer; but the act contains no provision for the dismissal of the Sheriff or Registrar, the only two public officers who are *ex-officio* made Returning Officers, for any neglect or refusal to perform the duties of that office, and in fact it appears from the papers put in as part of the case, that the charge against the plaintiff was the alleged misappropriation of some moneys which he received to defray the charges of the election, an offence not provided for in the statute at all, and which was not enquired into or adjudicated upon before any Court having civil or criminal jurisdiction; and though the Crown has the prerogative by letters patent to suspend a public officer whose appointment is for life, still after suspension the officer is entitled to receive the salary, though not to exercise the functions of the office—*Slingsby's case* (3 Swanst. 178).

I have not overlooked the case of *Smyth v. Latham* (9

Bing. 692), which Mr. Richards cited, but the wide difference in the facts renders it inapplicable to the present discussion.

On the whole, I am of opinion that the rule obtained by the defendant must be discharged.

As to the necessity of writ of discharge, see *Sir George Reynel's* case (9 Co. 98).

HAGARTY, J.—I am unable to place any other construction upon the Registry Acts, than that the Registrar holds his office, as it were, of freehold, subject only to removal for one or more of the specially assigned causes.

The Consol. Stat. U. C., ch. 89, sec. 10, and the late act 29 Vic., ch. 24, sec. 8, contain similar words of appointment under the Great Seal, with power to “fill up any vacancy occurring by the death, resignation, removal or forfeiture of office by any Registrar.” Both acts prescribe certain cases in which the Governor General “may in his discretion,” remove the Registrar. The earlier act requires in addition a presentment of the facts by a grand jury.

At the time of the defendant McLay's appointment, the former act was in force.

The defendant urges that the plaintiff's appointment is by his commission expressly limited to the pleasure of the Crown.

Once it is conceded that the statute provides for a tenure during good behaviour, or at least till the happening of certain specified events, I think there is no power lower than that of the Legislature that can limit the officer to a tenure during pleasure, even where the appointment is specially accepted on such a condition. This point is established by a number of cases, and is noticed in a recent judgment of our Court of Error and Appeal—*Weir v. Mathieson* (3 E. & A. Rep. 123); see also *Regina v. Governors of Darlington School* (6 Q. B. 682).

It is also argued that in the last Registry Act, as in the former, it is provided that every Registrar in office when the act took effect is thereby “continued therein, subject to the laws in force respecting public officers, and to the provisions

and requirements of this act." This, I think, cannot have the very serious effect of turning an office, which I think the Legislature meant to be held during good behaviour, into one held during pleasure, which would certainly be its effect so far as the County of Bruce is concerned.

Nor can I think that the Interpretation Act helps the defendant. That could have been only designed to supply the omission of formal words giving the power of removal, not to introduce a new power of removal at discretion in cases in which the Legislature have provided for removal for specified causes and in a specified manner.

If a particular tenure be created of an office, and a person be appointed to that office, with all its rights and privileges, I do not see that the insertion of the words "during our royal pleasure," can legally limit or narrow the statutable rights of the appointee, whatsoever those rights may be.

The facts of the case before us may, perhaps, induce an opinion that it might be as well for the interests of the public that the office should be held on no higher tenure than that of a Sheriff, and most other appointments under the Crown. This at least might be thought, so long as the duties of a Returning Officer at a contested election might be cast upon the person holding the office of Registrar.

MORRISON, J., concurred.

Rule discharged.

GILPIN ET AL V. THE ROYAL CANADIAN BANK.

Principal and agent—Liability of principal for torts.

The plaintiffs had stored grain at Seaforth in the warehouse of one T., from whom the defendants held warehouse receipts as security for certain notes. T. having left the country, R., defendants' agent at Seaforth, was advised by their solicitor to get authority from him to sell the wheat covered by their receipts. He accordingly followed T. to the States, and obtained a written authority to sell all the grain in the warehouse belonging to him. The plaintiffs alleged that acting under color of this authority he converted wheat belonging to them in the warehouse, for which they brought trover against defendants.

Held, that if so there was evidence to go to the jury to make defendants responsible for R.'s acts.

TROVER for 4872 $\frac{44}{80}$ bushels of spring wheat, 636 $\frac{49}{80}$ bushels of fall wheat, 271 bushels of barley, and four bushels and twenty-five pounds of grass seed.

Pleas.—1st. Not Guilty. 2nd. Goods not the plaintiffs'.

The case was tried at Stratford, at April 1867, before Morrison, J.

The plaintiffs charged the defendants with the conversion of grain stored in the warehouse of one Robert Todd, at Seaforth. There was no dispute that the plaintiffs had stored such grain there, which they had a right to take away on payment of the warehouse charges. It appeared that Todd was liable to the defendants upon some notes, the particulars of which were not proved, and also that the defendants had got some warehouse receipts from him, which it might be inferred were given by way of security to the defendants. Before these notes matured Todd left Seaforth and removed to the United States.

One Hugh R. Russell was the defendants' agent at Seaforth, and apparently after Todd's departure he consulted with the defendants' solicitor, and upon his advice to get authority from Todd to sell the wheat for which the defendants held Todd's receipts, as the defendants had no authority to sell until ten days after the notes fell due, Russell went to Milwaukee, where he saw Todd and obtained from him a written authority to defendants to take possession of and sell all the wheat and all other grain belonging to

Todd in the warehouse at Seaforth, it being stipulated by Todd that the defendants after the sale of the wheat were to pay Todd all moneys received for the said wheat, over and above the sum which Todd might owe them at the time of such sale. Russell stated that he had no directions from the head office to go to Todd, but after his return he applied to the head office for instructions. Before that he said he acted on his own responsibility, doing what he thought best for them. He wrote to them that he had made a sale of their wheat.

Evidence was given that Russell took a letter to one Coleman, after which he got the key of the warehouse and went into it, and the plaintiffs proposed to prove acts of conversion of their wheat by Russell, but they stated they had no further evidence to give of Russell's authority to bind the defendants.

The learned Judge ruled that the act complained of was not an act within the ordinary business or the duties of a Bank agent, or in the course of the agent's employment, and that to make defendants liable the agent must have acted by the express command or authority of the defendants: that there was no evidence of authority to take the key or possession of the warehouse, or to hold the wheat in question; that these were acts beyond the scope of the agent's authority. Upon this ruling the plaintiffs' counsel submitted to a non-suit.

Anderson obtained a rule to set the nonsuit aside, contending that the defendants were responsible for the tortious acts of their agent in converting the plaintiffs' goods.

C. Robinson, Q. C., and *Robert A. Harrison*, shewed cause, citing *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Glover v. London and North Western R. W. Co.*, 5 Ex. 66; *Wright v. Woollen*, 7 L. T. Rep. N. S. 73; *Lingard v. Kirkpatrick*, 15 L. T. Rep. N. S. 245; *Lindley on Partnership*, 237; *Add. on Torts*, 275.

Anderson, contra, cited *Huzzey v. Field* 2 C. M. & R. 432; *Seymour v. Greenwood*, 7 H. & N. 355; *Croft v. Alison*, 4 B. & Al. 590.

DRAPER, C. J., delivered the judgment of the Court.

We are of opinion this case comes within the general rule so clearly stated by *Willes, J.*, in giving the judgment of the Exchequer Chamber in *Barwick v. English Joint Stock Bank* (L. R. 2 Exch. 259), which judgment was not given when this case was tried, and in which the ruling at the trial was overruled on the bill of exceptions. That rule is "that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."

In this case Russell, who was the agent of the defendants at Seaforth, took the advice of their solicitor as to what he should do for the security, payment, or advantage of the defendants, his principals, to whom Todd was a debtor. Acting upon that advice he took certain steps, and obtained an authority from Todd upon which he acted. The plaintiffs complain that in what he did under colour of that authority he tortiously converted their property. Whether this is actually so or no, whether the plaintiffs owned the property or no, or whether Russell converted it, is as yet to be established, but if so we think there was clearly evidence enough to be submitted to the jury to make the defendants responsible within that rule.

If the act had been one which the defendants could not have done, because of want of power or authority, the act of the agent would not make them liable, as if a station master arrested and detained a passenger for non-payment of the carriage of his goods by the same train, after having given up the goods to him, the Company only having power to detain the goods, the Company would not be liable—*Poulton v. London and South Western Railway Company* (Weekly Notes, 6th July, 1867, p. 210.)

We think therefore the rule must be made absolute without costs.

Rule absolute.

PAYNE V. GOODYEAR ET AL.

Sale for taxes—Redemption of part—C. S. U. C., ch. 55, sec. 113.

An entire lot having been sold, one C. paid the redemption money on the east half, and one P. on the west half, but it was afterwards represented to the council that P.'s payment had been made by mistake, and the Treasurer being ordered to refund, applied the money by P.'s authority to another lot.

Held, that under Consol. Stat. U. C. ch. 55, sec. 113, the owner of part of a whole lot sold for taxes might redeem such part on paying the proportionate amount chargeable against it; and that the clause did not merely allow such payment before sale. The east half was therefore held to have been properly redeemed, but

Quære, if redemption of the whole had been necessary, as to the effect of P.'s payment by mistake.

TRESPASS for breaking and entering the plaintiff's land, being the east half of lot No. 13, on Water street, in the town of Chatham, destroying plaintiff's crops, sowing seed, digging holes, planting blocks of wood, erecting a wooden building, and, with weapons and a vicious dog, assaulting the plaintiff, and driving him and his servants off the land—*per quod*, &c., &c.

Second count, for breaking and entering plaintiff's land, being the east half of lot 13 on Water street, in the town of Chatham, throwing open gates, and ploughing up the plaintiff's potatoes; and the plaintiff claimed a writ of injunction.

Pleas.—1. Not guilty. 2nd. To the first count, land not the plaintiff's. 3rd. To the first count, that at the time of the alleged trespass the land belonged to John Hooper, one of the defendants, and the defendants Watson, Holmes, and Longwell, entered as his servants by his command.

Similar plea to the second count.

The trial took place in October, 1866, at Chatham, before Hagarty, J.

There was proof of the alleged trespass against four of the five defendants, but none against Goodyear. The plaintiff to prove his title put in three deeds, the execution of which was admitted.

1. A deed from John Mercer, Esq., Sheriff of the County of Kent, dated the 26th of August, 1861, witnessing that in

consideration of \$20.57, paid by Charles Greenwood at public auction, on the 17th of December, 1858, under the Assessment Act, 16 Vic., for arrears of taxes, under a writ to him directed, he sold and conveyed to Charles Greenwood, his heirs and assigns, the lot No. 13, on the south side of Water street, in the town of Chatham, containing one acre, *habendum* in fee.

2. A deed from Charles Greenwood to John Miller, consideration \$200, for the east half of the same lot, containing half an acre; *habendum* in fee.

3. A deed from John Miller to the plaintiff, consideration \$250, for the east half of the same lot; *habendum* in fee.

The Treasurer proved that this lot was sold in October, 1858. The amount of taxes in arrear was \$16.87. The taxes had not been paid for the years 1851, and 1857; for the intermediate years they had been paid. The sale actually took place on the 9th of October, 1858. On the 30th of September, 1859, Thomas Crowe redeemed the east half, and it was so entered as redeemed. He paid the money, which was garnished as the money of Greenwood, the purchaser, on a judgment in favor of an execution creditor.

The lot had been assessed and sold as one entire lot. The redemption money was paid by Crowe only on the east half, but the other half was redeemed by Mr. Prince on the 8th of October, 1859, who paid the money to the Treasurer. These two payments each included the ten per cent. Some time afterwards it was represented to the council that Mr. Prince's payment was a mistake, and the Treasurer was ordered to refund, and he, by Mr. Prince's authority, applied the payment to another lot. This lot had been returned as vacant in 1851, and was assessed to one Vosburgh in 1857, and a warrant issued to levy the taxes from him was returned *nulla bona*.

The Treasurer's return of lands redeemed within twelve months from the day of sale was proved. It stated that on the 30th of September, 1859, Thomas Crowe redeemed the east half by paying \$11.86; and on the 8th of October, 1859, Albert Prince redeemed the west half by paying a

like sum. The Treasurer afterwards notified the Sheriff of the mistake about the redemption by Mr. Prince, and then the Sheriff conveyed the whole lot to Greenwood, but this he explained was a mistake, that it should only have been for the west half.

On the defence it was objected that the lot was redeemed within the year in fact, and that the subsequent disposition of the money could not undo it.

It was answered that the redemption of one half was nugatory, and that a payment made in error and mistake as to the other half was no redemption.

Leave was reserved to move on this objection.

Thomas Crowe proved the payment on the east half, and that afterwards, and within the year, he went to inquire if he had a right to pay the whole, and was informed that Mr. Prince had paid the other half. He said he did not know whether he was not liable to pay the whole.

A verdict was entered for the defendants, with leave reserved to the plaintiff to move to enter a verdict for \$10 against all the defendants except Goodyear.

In Michaelmas Term *Atkinson* obtained a rule calling on the defendants, except Goodyear, to shew cause why the verdict as to them should not be set aside, and a verdict entered for the plaintiff on all the issues, with \$10 damages, pursuant to leave reserved, on the ground that the plaintiff shewed a good title to the land, and that there was no redemption properly proved.

In this Term *Robert A. Harrison* shewed cause, citing Consol. Stat., U. C., ch. 155, secs. 140, 141, 142, 148, 149, 150; *Buchanan v. Poppleton*, 4 Jur. N. S. 414, S. C. 27 L. J. C. P. 210; *Boulton v. Ruttan*, 2 O. S. 362; *Mair v. Holton*, 4 U. C. R. 505; *Allan v. Hamilton*, 23 U. C. R. 109.

Atkinson supported the rule.

DRAPER, C. J., delivered the judgment of the Court.

There seems no doubt that the redemption money was actually paid on the east half of this lot number thirteen,

within a year from the sale; that the Treasurer received it expressly on account of the sum charged upon that part of the lot, and that the money so paid, though not paid over to the purchaser, was taken through legal process, and received by an execution creditor of the purchaser, and *pro tanto* discharged a debt due by him. If this payment to the Treasurer was a legal discharge of the taxes due on the east half, then the plaintiff has no right to recover, for his title and ownership, and consequently his claim to damages for trespass on that piece of land, are dependent on the sale for taxes (which is not disputed), and on the non-redemption of that land in the manner authorised by the statute.

It appears to us that under the 113th section of the Assessment Act, whenever satisfactory proof is adduced to the Treasurer that an entire lot has been sub-divided, that officer must adjudge the question of sub-division, and finding the fact established he has a right to receive the proportionate sum of the taxes due on the whole in discharge of the particular sub-division so ascertained. When he has in good faith determined that the lot has been sub-divided, and then receives the due proportion of the taxes, the sub-division is as much discharged from the incumbrance as if the taxes on the entire lot had been paid.

But the 113th section refers only to *taxes*, and is not in its express terms applicable to redemption money, with regard to which there are the rights of the purchaser to be considered, as well as those of the owner of the land or of the municipality entitled to the tax.

The contention of the defendants is, that the power of the Treasurer under the 113th section extends to lands sold for taxes so long as the right to redeem remains in the owner, and after the best consideration we can give, we have adopted that conclusion.

The primary, it may be said the sole, object of the Legislature in authorizing the sale of land for arrears of taxes, was the collection of the tax. The Statutes were not passed to take away lands from their legal owners, but to compel those owners who neglected to pay their taxes, and from

whom payment could not be enforced by the other methods authorized, to pay by a sale of a sufficient portion of their lands.

All lands which had been described as granted by the Crown were subject to a tax for local purposes, and when unoccupied, and no distress to be found upon them, the lands themselves, after the taxes had been in arrear a fixed number of years, were liable to sale. Primarily each lot as granted by the Crown was charged, but as the grantees might in various ways have parted with their rights in severalty to different persons who acquired portions less than the whole, the 113th section was passed for the relief of such persons, to enable them by the payment of the tax due on the part they owned to acquit themselves and their estate, leaving the remainder of the lot chargeable with its due proportion also. The power to sell land was created in order to collect the tax, and the same reason that influenced the Legislature to enable the true owner of a part to pay his proper part of the taxes on the whole lot, would exist in his favour to permit him to redeem.

Now, in treating the 113th section as extending to the latter case, no violence whatever is done to its language. The Treasurer is, under the 148th section, the officer to receive the redemption money, which in fact is the amount of the taxes in arrear, plus the charges of sale and ten per cent., to which the purchaser is entitled as a recompense for having advanced his money. The spirit of the 113th section is satisfied by the payment of the tax on the subdivision of which satisfactory proof has been given; the spirit of both sections is fulfilled by the collection of the tax on the sub-division, and the redemption by the owner on the terms imposed by the 148th section.

And the principle of section 113 is remedial. A man purchases an acre of an unoccupied 200 acre lot. At the time of his purchase the tax for some preceding year has been suffered to fall into arrear. He erects a dwelling on his purchase, and then finds that the tax for that year is due; and but for the 113th section he must pay the tax on

the other 199 acres, or his one acre may be sold. If it has been sold, and the 113th section does not help him, to save his acre he must pay the taxes on the whole 200, with the costs and the additional ten per cent. And if the 148th section were strictly and literally construed, he would have no legal right to redeem the 199 acres, because he was not the owner of them, but only of the one acre.

We think it more in accordance with the spirit and intention of the act to hold that the benefit conferred on owners of land, under the circumstances stated in the 113th section, should be treated as extending to owners similarly circumstanced, as owning a sub-division of a lot, and to enable them to redeem it on adducing satisfactory proof to the Treasurer of the sub-division.

In our opinion, therefore, the payment received by the Treasurer of the proportion of the arrears of taxes for which lot 13 was sold, which would be and in fact were due in respect of the east half only, was an effectual redemption of that half lot. And we prefer to rest our conclusion in favour of the defendants on this ground to entering upon the (to my apprehension) more doubtful question on the payment made by mistake by Mr. Prince on the west half of the lot, a payment which at first glance can hardly be said to have redeemed the lot, without holding that the form not the substance is to be considered by the Court. The municipal council, as it seems, have treated the payment by mistake as not incapable of correction, by making a transfer of it to the proper lot.

However, I do not desire to bind myself to any opinion as to the legal effect of the payment by Mr. Prince. On a merely superficial view it seems open to objection, but a careful consideration might lead to a conviction that it should prevail to prevent forfeiture.

We think the rule should be discharged.

Rule discharged.

MCMILLAN V. McDONALD.

Tax sale—6 Geo. IV., ch. 7—Sale by Sheriff out of office.

In ejectment the defendant claimed through a sale for taxes made under 6 Geo. IV., ch. 7. The warrant relied upon issued in 1837 to the then Sheriff, M., who ceased to hold office in 1838; the return stated the sale to have been made in 1840; and M. executed the deed in 1841.

Held, clearly insufficient, for the sale and deed being made by a person out of office were *prima facie* unauthorised, and defendant gave no proof of any proceedings taken by M. which could be regarded as an inception of execution.

If there had been such proof, *Quere*, whether the law as to inception of execution or process applies equally to tax sales and to sales of land on judgments.

EJECTMENT for lot No. 14, in the sixth concession of Finch.

The plaintiff claimed under the will of John McMillan, deceased. Defendant relied on a tax sale, limiting his defence to the south 190 acres of the lot.

The case was tried at Cornwall, before Adam Wilson, J.

A patent to John McMillan, his will, and the plaintiff's title under it were duly proved.

None of the exhibits mentioned in the learned Judge's notes were forthcoming. A deed was produced, executed by the then Sheriff Donald McDonald, dated the 2nd February, 1841, consideration—£3 18s. 7d., conveying 190 acres to Kenneth McLachlan, in fee.

The Sheriff's return to the Treasurer of the sale of this lot for taxes, stated that it was sold, 100 or 190 acres of it, on the 29th of January, 1840, to McLachlan, for £3 18s. 7d.

The Treasurer proved that he entered on his office in 1846; that Alexander McLean was Treasurer at the time the warrant for sale was said to have issued, in 1836 or 1837. All his books and papers, except a book containing the assessment of lands, and that produced, shewing the Sheriff's return, and another book of returns of sales for 1828-9, were said to have been stolen, and never came to the present Treasurer's hands. He searched for but could not find a warrant. It was admitted that McMartin was Sheriff from

1838 to 1848, when Donald Æneas McDonald was appointed, and continued till 1850.

The Sheriff's return before referred to stated, "Schedule of lands in township of Finch for assessment and arrears to July, 1838, according to the warrant directed to the Sheriff of the Eastern District by the Clerk of the Peace, dated October, 1837."

This memorandum was not in the writing of Donald McDonald, who was Sheriff up to 1838, and for some years preceding, but was thought to be in the writing of a young man named Brand, employed in the Sheriff's office.

The Clerk of the Peace swore to a search, and that the warrant could not be found. He said there was a Treasurer's return in his office of a schedule of lands in arrear for eight years to the 1st of July, 1836. This lot was put down as in arrear £3 0s. 5d. On the back of this return was endorsed, in the writing of Pringle, then Clerk of the Peace, "Received 13th July, 1837. Writs issued to the Sheriff dated 16th October, 1837, returnable 10th July, 1838. (Signed) James Pringle, Clerk of the Peace."

It was agreed that the present Sheriff's office need not be searched for the writ, as it was not there; that if the former Sheriff's son, who had his papers, would make an affidavit as to search, it might be received as evidence by the Court in term.

It was objected by the plaintiff that there was no proof of a warrant; that the writ spoken of was returnable in July, 1838, and had lapsed before the sale in 1840; that the Donald McDonald who executed the deed in February, 1841, and received the warrant spoken of, ceased to be Sheriff in 1838, and could not sell or make a deed, and he was not shewn to have done anything under the alleged warrant; that the description of land in the deed was not in accordance with the statute; that the sale was for too much; that the arrears were only £3 0s. 5d.; that only 7s. 6d. could be added; that the Sheriff's return of having sold 100 or 190 acres avoided the sale for uncertainty.

It was agreed there should be a verdict for the plaintiff,

defendant having leave to move to enter a verdict in his favor.

S. Richards, Q. C., obtained a rule *nisi* accordingly.

Kerr shewed cause, citing *Maxcy v. Clabaugh*, 1 Gilman 26; *Bestor v. Powell*, 2 Gilman 119.

HAGARTY, J., delivered the judgment of the Court.

Placing defendant's evidence in the most favourable light, and assuming everything in his favour, his case will stand thus: A warrant was issued by the treasurer to the Sheriff on the 16th of October, 1837, returnable on the 10th of July, 1838. The Sheriff receiving such warrant ceased to be Sheriff in 1838.

The land was returned by some body as sold to Kenneth McLachlan on the 29th of January, 1840, at least a year after that Sheriff left office; and the deed produced, to McLachlan, is dated the 2nd of February, 1841, more than two years after his leaving office.

The defendant makes no attempt whatever to explain this proceeding. He proves no steps taken by the Sheriff by whom the writ was received, or anything to afford any plausible reason for his executing the deed more than two years after he ceased to be Sheriff.

The statute 6 Geo. IV., ch. 7, governed that sale, and sec. 18 directs that if land be not redeemed within twelve months from the sale, then "*the Sheriff for the time being*" shall, on demand of the purchaser, execute a conveyance, &c. This expression "*for the time being*" is omitted in subsequent acts.

If defendant can apply the doctrine of *Doe Tiffany v. Miller* (6 U. C. R. 426), to this case—that a Sheriff having made an inception of executing the writ may proceed to its completion by sale, and execute the conveyance—we would still require some evidence of such inception. *Primâ facie* the sale and the deed were both made by a person not filling the office of Sheriff, and as such incapable of doing the acts directed by the law to be done by the Sheriff. It must rest, we think, on the person relying on such a sale and

conveyance to support their validity. Nothing of the kind is shewn here.

The writ is by the statute declared to be returnable at the third Quarter Sessions after issuing the same. This writ was found to be returnable on the 12th of July, 1838, and some time in that year, without proof of anything done under the writ, the then Sheriff left office.

The late Sir James Macaulay said, in *Doe Tiffany v. Miller* (6 U. C. R. 448), "I also think that, however the Courts may for reasons of policy be disposed to favor *bond fide* purchasers at Sheriff's sales, the maxim of *caveat emptor* so far applies, that any one purchasing at such sale from a person out of office, and after the return day of the writ, must take the onus of proving that such person (whose *primâ facie* right to execute the writ thus ceased) had while in office, and before the return day expired, done that which rendered the subsequent sale valid."

No proof of such an inception was, as already noticed, given in this case. We must not be considered as assuming that the law as to inception of execution or process applies equally to tax sales and sales of land on judgments. Many wide distinctions might be pointed out between the two classes of cases. The sale in the case of a *fi. fa.* on a judgment is final as to the interest sold; the sale by a Sheriff on a tax warrant is defeasible by payment within twelve months thereafter, &c.

But even giving defendant the benefit of the doctrine, we feel it impossible to hold that the title of the true owner of an estate could be held to be divested by such evidence as was given in the case before us. *Primâ facie* the title set up by defendant was clearly bad, and we cannot see that he proved anything to get rid of the one fatal objection—a sale and transfer by a person apparently having no right whatever to act as Sheriff.

With this view it is unnecessary for us to discuss the other very serious objections to defendant's case, as to reception of the memorandum or return made by Brand, (on which see *Smith v. Blakey*, L. R. 2 Q. B. 376), as to

the description of the land, the return of the Sheriff, the amount of the alleged arrears, and the insufficiency of the search among the Sheriff's papers, as to which no affidavit was produced in term.

It may be that the defendant may be able to supply some of this missing evidence on a future occasion, as our judgment is not final. But we have no alternative but to discharge defendant's rule.

Rule discharged.

McDONALD v. MCGILLIS.

Deed—Construction—Estate in fee or for a term of years—Livery of seisin.

A. by Indenture, in 1826, in consideration of the rents and covenants by M. to be paid and performed, "granted, demised, and to farm let "to M., his heirs and assigns" certain land, *habendum*, "unto the said M., his heirs and assigns, from the day of the date hereof, for and during the term of twenty-one years," yielding and paying yearly during the said term to M., his heirs and assigns, the sum of 7s. 6d. There was a covenant by M. to pay rent, and by A. for quiet enjoyment during the term. At the end of the term M. gave up the lease to A., saying he had no further claim, but he was allowed to continue in possession upon no definite understanding, and defendant went in after him. Upon ejectment brought by the devisee of A., a verdict was directed for defendant, on the ground that the indenture passed the fee.

Held, that without livery of seisin the fee simple granted in the premises could not take effect, and the *habendum* for twenty-one years would stand; but a new trial was granted to determine the fact of livery.

Semle, that the jury should not be directed to presume livery of seisin, as they would be if the possession had been held as on a claim of absolute ownership.

EJECTMENT for part of the west half of lot 9, in the sixth concession of the township of Lancaster, containing two acres, to which the plaintiff claimed title by deed of bargain and sale from one John McDonald. The defendant claimed title by possession.

The trial took place at Cornwall, in April last, before Adam Wilson, J.

It appeared that one Archibald McDonald died in possession of the lot of which these two acres formed part, having

by his last will, bearing date the 7th of October, 1828, devised the same to his two nephews, Archibald, the plaintiff, and John, who conveyed his interest to the plaintiff. During the lifetime of the testator one Alexander McDougall occupied the two acres in question, in all more than forty years, and left them about three or four years before the trial. The defendant went into possession after McDougall quitted it, and was in possession at the time of the trial.

By indenture, dated 15th November, 1826, Archibald McDonald (the testator), in consideration of the rents, covenants, and agreements, thereafter contained on the part of Alexander McDougall to be paid, done and performed, "granted, demised, and to farm let," unto the said Alexander McDougall, his heirs and assigns, the two acres in question, "to have and to hold the said piece or parcel of ground unto the said Alexander McDougall, his heirs and assigns, from the day of the date hereof, for and during the term of twenty-one years from thence next ensuing, and fully to be complete and ended. Yielding and paying therefor yearly and every year during the said term of years, unto the said Archibald McDonald, his heirs and assigns, the sum of seven shillings and six-pence of lawful money; the first payment to be made at or upon the 15th of November, 1827, and so on yearly and every year during the rest and remainder of the said term of years." The lessee, Alexander McDougall, for himself and his heirs, covenanted with the lessor, Archibald McDonald, to pay the rent. "And the said Alexander McDougall, his heirs and assigns, paying the rents and performing the covenants hereinbefore mentioned, reserved and contained, on the part of the said Alexander McDougall, to be paid, done, and performed, shall lawfully, peaceably, and quietly enter into, have, hold, occupy, possess and enjoy the said piece or parcel of ground hereinbefore granted and demised, together with all the appurtenances thereunto appertaining or in anywise belonging, for and during the said term of twenty-one years, without the lawful let, suit, trouble, molestation, eviction, expulsion, interruption, or denial whatsoever, on the

part of the said Archibald McDonald, his heirs, executors, administrators, and assigns."

It was sworn that when the term of twenty-one years expired Alexander McDougall gave up this lease to the plaintiff, saying the land belonged to him, and that he (McDougall) had nothing to do with the lease any more; but he still occupied the land, doing blacksmith work for the plaintiff in consideration of being left on the place. No particular understanding about the blacksmith work was proved, but the plaintiff got his work done by McDougall, who was an old man, and plaintiff "would not be severe upon him."

The defendant went on to the lot after McDougall left it. He was married to a daughter of McDougall. One witness stated that he believed that McDougall let defendant into possession; that there was a house on the two acres, and McDougall carried on his trade as a blacksmith on the place.

On these facts the learned Judge directed a verdict for the defendant, holding that by the indenture of the 15th of November, 1826, the fee passed to McDougall, but he reserved leave to the plaintiff to move to enter a verdict for himself, if the Court should be of opinion that the indenture only granted a term for twenty-one years.

S. Richards, Q. C., obtained a rule on the leave reserved to enter a verdict for the plaintiff, or for a new trial, for misdirection, in ruling that the deed was a conveyance in fee simple, or on the law and evidence, the plaintiff having made out title, and the defendant not having established a defence.

Kerr shewed cause, citing *Shep. Touch.* 75; *Baldwin's Case*, 2 Co. 23; *Com. Dig.* Vol. iv. ch. 21, secs. 75, 76; *Preston on Abstracts*, Vol. iii. p. 43; *Smith on Real and Personal Property*, 3rd ed., p. 624; *Co. Lit.* 299 a; *Goodtitle dem. Dodwell v. Gibbs*, 5 B. & C. 709; *Doe dem Timmis v. Steele*, 4 Q.B. 663; *Doe Meyers v. Marsh*, 9 U.C.R. 242; *Brown v. Stuart*, 12 U. C. R. 510; *Owston v. Williams*, 16 U. C. R. 405.

S. Richards, Q. C., contra, relied upon *Baldwin's Case*, 2 Co. 23.

DRAPER, C. J., delivered the judgment of the Court.

The intent of the parties is always to be regarded in the construction of deeds, and if by any construction that intent can be given effect to in accordance with settled legal principles, the Court will so construe it. But to ascertain the intent the language used must be taken according to its plain meaning and legal effect. The deed must be so construed as that without wrong to the grantor the greatest advantage may be given to the grantee; that the construction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts do agree together and there be no discordance therein, and that the effect as much as may be shall be to that purpose for which it was made.—*Shep. Touch.* 87; 4 *Cruise Dig.*, chaps. 19, 20.

In this case, we find in the premises that the grantor, in consideration of the covenants, rents, and agreements thereinafter mentioned, reserved and contained, “doth grant, demise, and to farm let to the” grantee, “*his heirs and assigns*, all that,” &c. Stopping there the grant is of a fee simple.

Words almost identical were used in the instrument on which the case of *Doe v. Gardiner* arose (12 C. B. 319), and wherein, after reciting an agreement to grant a perpetual lease to J. H., his *heirs*, executors, administrators, and assigns, the grantor in consideration of the “rents, covenants, and agreements, thereafter mentioned and reserved, granted, demised, leased, set and to farm let unto the said J. H., his heirs, executors, administrators and assigns, unto and to the use of the said J. H., his heirs,” &c., (as before) “for ever,” yielding and paying therefor yearly and every year a clear yearly rent. *Jervis, C. J.*, in giving the judgment, said expressly that if the Court were to presume livery of seisin, this instrument would operate as

a conveyance in fee, though an examination of it shewed that the parties intended it to operate as a perpetual lease, an operation which it could not legally have. It had been agreed that the Court should draw any inferences of fact which a jury might have drawn, and they held it to be more consistent with the acts of the parties to presume that the relation of landlord and tenant subsisted between them, and that in fact the premises had been held under a yearly tenancy. But he says distinctly that, "were it necessary to presume livery of seisin, *in order to account for the possession under the instrument,*" the authorities shewed that presumption ought to be made.

We cannot say that we have any doubt, after a careful consideration of the indenture before us, that the parties intended only to create a term for twenty-one years. At the same time we cannot so construe the language used. The words heirs and assigns create an estate in fee simple, not a term. But before the deed can so operate, livery of seisin is as necessary as in *Doe v. Gardiner*, for this instrument can only operate as a conveyance at common law. The Court has no power reserved to it to draw conclusions of fact, and the fact of livery of seisin was not left to the jury, though adverted to in the argument.

There appears no doubt that possession was taken under the indenture of 1826. If the *habendum* is void such possession must be referred to the grant of the fee. In 4 Cruise Dig., ch. 21. secs. 75, 76, the law is stated to the following effect: where the *habendum* is contradictory to the premises it is void, and the grantee will take the estate given in the premises. Thus, if lands are given in the premises of a deed to A. and his heirs, *habendum* to A. for life, the *habendum* is void, because it is utterly repugnant to, and irreconcilable with, the premises.

The fourth resolution in *Baldwin's* case (2 Co. 23), referred to on the argument, seems however to us to govern the present question. When to the perfection of the estate limited by the premises some ceremony is requisite, and nothing more than the mere delivery of the deed is required

to the perfection of the estate limited by the *habendum*, there, although the *habendum* be of a lesser estate than is mentioned in the premises, if that ceremony be not performed the *habendum* shall stand. We refer also to *Kendal v. Micfeild* (Barnardiston Chy. Rep. 47). where the Master of the Rolls says with regard to an *habendum*, "It has never been disputed but that it will carry the limitation of the estate farther than the premises of the deed did * * On the other hand, it is clear that the *habendum* never abridges the estate granted by the premises of the deed."

Now in this case, in order to perfect the estate granted by the premises, namely, a fee simple, livery of seisin was requisite, and without it only an estate at will would pass, but the *habendum* for years would take effect immediately on the delivery of the deed, and so it would appear that it was the intent of the parties that the indenture should take effect by that delivery, without livery of seisin, to pass an estate for twenty-one years.

Therefore, assuming that there was no livery of seisin, McDougall having entered into possession under the indenture became possessed of the term, not of the fee, and the term having expired in November, 1847, the plaintiff would be entitled to recover. But the fact, livery or no livery, is not found. As at present advised, we do not think the jury should be directed to presume livery of seisin, as they would be told to do if there had been twenty years possession held as on a claim to be owner in fee. The evidence given of McDougall's conduct leads to the conclusion that he never claimed to have taken possession or to have held it as absolute owner, and the case may be distinguished from *Doe v. Marquis of Cleveland* (9 B. & C. 864), and *Doe v. Davies* (2 M. & W. 503). See also *Doe v. Cole* (7 B. & C. 243).

In our opinion there should be a new trial without costs.

Rule absolute.

IN RE BRADSHAW AND THE REGISTRAR OF THE COUNTY OF SIMCOE.

Registrar—Form of certificate—29 Vic., ch. 24, sec. 53.

A registrar endorsed on a mortgage sent to him for registry as follows :
"No. 41322, *purporting to be* a duplicate hereof, was recorded" at, &c.,
on, &c.

Held, clearly not a compliance with the statute, 29 Vic., ch. 24, sec. 53, under which the registrar must examine the instruments and certify without qualification the facts which he is required to state.

C. S. Patterson obtained in last Hilary Term a rule *nisi*, calling on the Registrar to shew cause why a writ of *mandamus* should not issue, commanding him to endorse upon an indenture of mortgage from M. to B., registered by him on the 9th day of January last, a certificate stating the certain year, month, day, hour, and minute in which the said instrument was entered and registered, expressing also in what book the same has been entered, and the number of registration; and why the Registrar should not pay the costs of the application.

The rule was granted upon an affidavit which set forth that Messrs. Beatty and Patterson, the agents of the applicant, on the 8th of January last, sent the mortgage, which was in duplicate form, to the Registrar to be recorded; that on the 23rd of January the Registrar returned one part of the mortgage, with a certificate endorsed on it as follows :
"No. 44322, *purporting to be* a duplicate hereof, was recorded at the County of Simcoe Registry Office on the 9th day of January, A. D. 1867, at one o'clock, and three minutes, P.M., in liber No. 47, for Nottawasaga."

This certificate was not signed by either the Registrar or his Deputy; and it was again sent to the Registrar accompanied by a letter, calling his attention to the fact of the want of signature, and to the insufficiency of the certificate in point of form, and requesting him to endorse a certificate on the mortgage of its registration, not that a No. *purporting to be* a duplicate was recorded.

To this the Registrar, by his Deputy, replied on the 8th of February, stating that the Registrar declined to comply

with the request of the agents of the applicant, giving as a reason that it was no part of the duty of the Registrar to compare duplicate instruments; and he returned the mortgage with the certificate above mentioned, signed by the Deputy Registrar.

During this term *Robert A. Harrison* shewed cause; and *C. S. Patterson* supported the rule.

The sections of the Registry Act bearing upon the question are cited in the judgments. 28 Vic. ch. 18, sec. 6, was referred to as to the power of the Court to award costs on such an application.

MORRISON, J.—By the 30th section of the Registration Act, 29 Vic., ch. 24, it is enacted, that all instruments shall be registered at full length, including every certificate and affidavit, upon and by the delivery to the Registrar of the original instrument, where but one is executed, or when such instrument is in two or more original parts, upon and by delivery of one of such parts. And by the 31st section, in case one of two or more original parts is registered, the Registrar shall endorse upon each of such original parts a certificate of such registration, and such original, so certified, shall be received as *prima facie* evidence of the registration, and of the due execution of the same. And by the 35th section it is provided, that all instruments (excepting wills and grants from the Crown) shall be registered by the deposit of a duplicate or other original part thereof, with all the necessary affidavits. And by the 39th section, sub-sec. 2, the witnesses shall swear to the execution of the original and duplicate, if any there be; which affidavit, by the 40th section, shall be made on the instrument. And by the 53rd section it is enacted, that the Registrar or Deputy Registrar “shall, upon production to him of the original instrument, duplicate or other original part thereof, together with an affidavit of execution, enter the said instrument in the registry book in the order in which it is received, and he shall file the same with such affidavit of execution, and he shall endorse a certificate on every such instrument, and shall

therein mention the certain year, month, day, hour, and minute, in which such instrument is entered and registered, expressing also in what book the same has been entered and the number of registration, and the Registrar or his Deputy shall sign the said certificate when so endorsed, which certificate shall be taken and allowed as evidence of such respective registers in all Courts of Record.

Upon an examination of these various sections, although they might have been better arranged and the language more aptly expressed, it is abundantly clear that the intention of the Legislature was, that all instruments should be registered upon the production and delivery to the Registrar, and by depositing with him the original instrument, or by the depositing of a duplicate or other original part thereof with all the necessary affidavits; and that he should enter the instruments in his books in the order of their reception; and register them at full length therein, and that he should endorse on any such instrument, and in case one of two or more original parts is registered upon each of such original parts, a certificate of the registration signed by him or his Deputy, stating the day, &c., of registration.

When the Legislature provided that the Registrar should endorse such a certificate, and declared that the instrument bearing such certificate should be relied on and received by Courts of Record as evidence, it would be absurd to suppose that it did not mean that the officer should take the precaution of examining and comparing the instrument on which the certificate was to be endorsed with the duplicate or other part registered at length in his books, and take care to see that he was certifying correctly. It would be certainly contrary to his duty were he to endorse the certificate on an instrument merely because it was produced to him, without taking the trouble of satisfying himself that it was the deed or mortgage of which a duplicate or other original part was entered in his book. Were it otherwise, one of the principal objects of the law would be to a great extent defeated; and I apprehend it would be equally a departure from his duty if he did not object to or point out any discrepancy in the instrument which came under his

notice. There are no words to be found in any of the sections indicating that the Registrar might sign the certificate without examination, or endorse on the instrument a qualified certificate.

What the Registrar has taken upon himself to endorse on this mortgage as a certificate is a mere bald memorandum, (the word certify or its equivalent is not used), that a number (referring I take it to some instrument) purporting to be a duplicate of the mortgage, was recorded at his office on such a day, &c., the meaning of which is, not that the mortgage bearing the memorandum was registered, but that an instrument meant for or said to be a duplicate, but which possibly is no duplicate at all, was recorded, &c. Such, in our opinion, was not the certificate intended or contemplated by the Legislature.

The language of the Statute clearly indicates the endorsement of a certificate certifying distinctly that the instrument endorsed was registered on, &c.

On the argument it was pressed in the way of excuse for the Registrar that he is not paid for examining instruments, and that it was not his duty to do so. We have already stated our opinion as to his duty. Whether the Legislature has allowed adequate fees or remuneration for the duties imposed on the Registrar, is not a matter for us to determine. He has accepted the office, and thereby assumes the responsibility as well as the performance of all the duties cast on him by the law.

DRAPER, C. J.—I fully concur in the judgment of my brother *Morrison*, and I also entertain a strong opinion that when the Legislature requires the Registrar to “endorse a certificate of registration,” (sec. 31) or to “endorse a certificate” containing certain particulars, and to sign such certificate, they contemplated and directed a plain expression on the part of the officer that *he certifies* to the facts which the law requires to be contained in such certificate in unequivocal language, asserting that such facts exist.

In the former act, Consol. Stat. U. C., ch. 89, wherever a

form of certificate is given, it begins, "*I hereby certify*," (Vide secs. 36, 43, 60, see also schedule A and sec. 58 in connection therewith, and compare sec. 26). The language of this act was the same or nearly the same in this respect as in sec. 53, but it has never been questioned, at least not in any reported decision, that the Registrar should state that he certifies to the requisite facts, and such was, I understand, the previous practice; and I think that the certificate should state, with or without the commencement, "*I hereby certify*," (though I prefer the use of these words) the fact that the instrument in question is registered, not that something purporting to be, &c., is entered or registered.

It was somewhat pressed on us that no fees are allowed to the Registrars for comparing duplicates, &c., together. I am inclined to think that the Legislature considered they had made a sufficient provision for the remuneration of these officers for all the services required, and that the Government will have no difficulty in finding competent persons to discharge the duties for the fees given.

HAGARTY, J., concurred.

Rule absolute, with costs.

BARETTO v. PIRIE.

Libel—Justification—Pleading.

The declaration was for a libel which charged defendant, an inspecting field officer of Militia, with swearing and drunkenness on a particular occasion specified *and generally*. Defendant pleaded that the statements complained of in the declaration were true in the sense in which they were alleged to have been used. *Held*, that the plea was bad, as being too general.

THE declaration set out a publication by defendant of a newspaper article respecting the plaintiff as inspecting field officer of volunteers and militia, in which, after referring to a recent inspection of a particular battalion, and stating that it was not often that "an example of swearing and drunkenness was set by the officers to their men," it was said that it

was very little to the plaintiff's credit that "he appears before the volunteers as a transgressor without apology of those laws of discipline and good conduct, the observance of which he so strictly enjoins." In another part it was said, "We have been for some time aware that the plaintiff was often incapable of attending to his duty here and elsewhere, and now that his evil habits appear to be entirely beyond his control, it is high time for the head of the department to deal with the case." *Inuendo*, that the plaintiff was intoxicated and in an unfit state to conduct the said inspection, and grossly misconducted himself, and was guilty of swearing profane oaths, and was also in the habit of being frequently intoxicated, and was thereby incapable of attending to his duties, and was so addicted to drunkenness and other evil habits that his conduct was calculated to bring the militia service into contempt.

Plea, that the statements contained and complained of in the alleged libel in the declaration are true in the sense in which they are alleged to have been used.

Demurrer, because the justification is too general, and does not set out any specific cases of misconduct on the plaintiff's part.

Anderson, for the demurrer, cited Sm. Lea. Cas. Vol. II., 6th ed., p. 67; *Honess v. Stubbs*, 7 C. B. N. S. 555; *Hunter v. Sharpe*, 13 L. T. Rep. N. S. 593; *Behrens v. Allen*, 8 Jur. N. S. 118, 121.

Robert A. Harrison contra, cited B. & L. Prec. 612.

DRAPER, C. J., delivered the judgment of the Court.

We think the publication complained of, without the aid of any inuendo or explanation, is libellous. In the outset it all but directly charges the plaintiff with setting an example of swearing and drunkenness when on duty, and proceeds to assert that the plaintiff was often incapable of attending to his duty, and that his evil habits, meaning, as we understand, those before set forth, appeared to be beyond his control, and required the notice of his superior officer.

The plea admits the libel as set out, and justifies it in the sense in which the expressions complained of are alleged to have been used. The inuendo does not extend the obvious and natural meaning of the words used, and if altogether struck out the complaint would be neither more nor less than the declaration otherwise asserts. If swearing, drunkenness, and a continued perseverance in evil habits were direct charges of specific acts, they might be met by a plea in the general form, that they were true in substance and fact; so if the charge of drunkenness and swearing were limited to one particular occasion, say the inspection first spoken of; but incapacity "here and elsewhere" is charged, and "evil habits," which "now appear to be entirely beyond his control;" and these expressions assert a series of acts, repeated drunkenness and swearing when on duty—a course of conduct discreditable to the service. This plea asserts no fact or facts on which the general conclusion is based, and affords the Court no opportunity of judging whether such facts in law justify the defendant in his general conclusion.

Behrens v. Allen (8 Jur. N. S. 118), is no authority for the defendant, though it shews that the Court will on a proper occasion allow a general plea of justification, the defendant delivering particulars of the facts on which he relies, of the specific charges which he intends to advance, in support of the general allegation that the libel is true. Here no such leave was given, or even asked.

We think the plaintiff should have judgment.

Judgment for plaintiff.

GIBBS ET AL V. GILDERSLEEVE.

Contract—Measure of damages.

Defendant, a steamboat owner, agreed to carry certain wheat of the plaintiffs from Oshawa to a port in the United States, by the 17th of March, when, as the defendant knew, the Reciprocity Treaty would expire and an import duty be payable there. He failed to do so, and the plaintiffs having sent the flour afterwards, were compelled to pay a large duty, which they would have escaped by getting it there before the expiration of the treaty.

Held, that such duty was recoverable as damages for the breach of contract; and that it was immaterial that prices rose in the States soon after the day fixed for delivery, so that the plaintiffs actually made more, after paying the duty, than they could have done by selling it on that day.

THE declaration stated an agreement made between the plaintiffs, owners of a large quantity of flour which they desired to have carried from the Port of Oshawa to Charlotte, on the Genesee River, in the State of New York, before the expiration of the Reciprocity Treaty, which would expire on the 17th of March, 1866, and the defendant, owner of the steamboat *Corinthian*, a vessel engaged in the carrying business on Lake Ontario, whereby, in consideration, &c., defendant agreed with the plaintiffs that the said steamboat would, weather permitting, be at Oshawa on the 15th of March aforesaid, to load with and carry 1500 barrels of the plaintiffs' flour from Oshawa to Charlotte, and would return to Oshawa to load with and carry for the plaintiffs from Oshawa to Charlotte, on the 17th of March aforesaid, 1000 barrels more of flour, at certain rates agreed upon. Averment that the vessel was not prevented by the weather from going to Oshawa on the said days, or either of them, yet the steamer did not go to Oshawa for the flour on the said days, or either of them, nor did defendant carry the flour for plaintiffs as agreed, but neglected and refused so to do; whereby the plaintiffs were put to trouble and expense in carrying the flour from their mills and storehouses to the harbour of Oshawa, and had to expend moneys in the cartage and recartage of the same, and were prevented from getting the flour into the United States before the expiration of the treaty, and lost great profits, to the amount of two

dollars on every barrel, which would have accrued to them if the flour had been got into the United States before the expiration of the treaty, and were obliged to pay a large import duty.

Pleas.—1. Did not promise. 2. That the *Corinthian* was prevented by the weather from going to the Port of Oshawa on the said days, or either of them, and by reason of the weather, and from no other reason, the said steamer did not go to the said port to carry the said flour as in the declaration alleged. Issue.

The case was tried at Whitby in October, 1866, before Morrison, J.

The agreement set out in the declaration was sufficiently proved by several letters and telegrams between the plaintiffs and defendant, and the plaintiffs claimed \$4000 as damages, being the duty which they had to pay at the rate of \$1.60 per barrel on the flour, on its being taken into the United States subsequently to the breach of contract by the defendant. It was admitted that the plaintiffs sent the flour to the United States, and that they paid the duty claimed. This was the plaintiffs' case.

It was contended for the defence that this only entitled the plaintiffs to nominal damages; that it was not shewn that the plaintiffs were under any necessity or obligation to send their flour into the United States, nor how it was disposed of when sent there; that although under the Reciprocity Treaty flour was admitted free of duty, and after the 17th of March the duty stated was payable on importation into the States, that was too remote a damage.

The learned Judge considered that the contract between the plaintiffs and the defendant was made in order that the plaintiffs' flour might not be subjected to the payment of the duty, and that the plaintiffs had to pay \$1.60 per barrel in consequence of the defendant not fulfilling his part, and that the jury should consider this in estimating damages.

The defendant went into evidence as to the relative prices of flour in the Montreal market, both before and after the 17th of March, 1866, and also as to the prices at New York

and Boston, with the view of shewing that the loss sustained by the plaintiffs having paid the duty was much less than the actual amount of that duty, and endeavouring to establish that by keeping the flour as in fact they did, they were actual gainers. A good deal of evidence was also given in order to shew that on the 15th, 16th, and 17th of March, the state of the weather was such that the *Corinthian* could not be safely taken into Oshawa.

In reply, the evidence as to the weather and the facility of going into Oshawa and loading on the 15th and 17th of March, was very contradictory to that given on the defence. It was also proved that flour paid a duty of twenty per cent *ad valorem*, and not \$1.60 per barrel, and that after the 17th of March, in the invoices presented to the American Consul at Toronto, of flour exported from Canada into the United States, flour was invoiced at \$1.60 per barrel less than before that day, and that flour was lower in value about a dollar or a dollar and a quarter per barrel in Boston and New York in consequence of the duty.

The learned Judge told the jury that if they were of opinion that the *Corinthian* was prevented by weather from going to Oshawa on the 15th and 17th of March, to find for the defendant, but if not so prevented from going to Oshawa on both or either of these days, that the plaintiffs were entitled to a verdict. As to damages, he directed that as the special circumstances as to the termination of the Reciprocity Treaty were known to defendant, and were in the contemplation of parties when entering into the agreement, which was made to secure the importation into the United States of the plaintiffs' flour before it would be subject to the payment of duties, as the plaintiffs had to pay and did pay such duties, a damage to that extent followed from the breach of the contract, and the jury might so consider it in assessing the damages; whether they gave damages upon the two quantities of flour respectively to be carried under the agreement on the 15th and 17th March, would depend on their finding that the weather was not the

cause on either of those days of the *Corinthian* not going to Oshawa.

The defendant's counsel objected to this direction, upon the grounds taken in the rule *nisi*.

The jury found for the plaintiffs, with \$2000 damages.

In Michaelmas Term *A. Crooks*, Q. C., obtained a rule calling on the plaintiffs to shew cause why there should not be a new trial, on the ground of misdirection, in telling the jury in effect that the duty imposed on flour coming into the United States after the 17th of March was an element of damage, and to consider it in assessing the damages, whereas the true measure of damages was the additional expense incurred by the plaintiffs in obtaining the delivery of the flour over and above the contract price stipulated for by defendant, or at most the loss of profit to be determined by a comparison of the market price of the day stipulated for delivery, or that of actual delivery; and it appearing that the plaintiffs had actually sold the flour at a higher price, after paying the duty, than that which they would have received if they had sold the flour at the time called for its delivery under the contract sued on, the jury should have been directed to assess nominal damages only; and that, inasmuch as the plaintiffs refused subsequently to send the flour by defendant's vessel, they by this act absolved the defendant from any liability to damages arising from the imposition of the duty.

In this Term *M. C. Cameron*, Q. C., shewed cause. He cited *Bodley v. Reynolds*, 8 Q. B. 779; *Borries v. Hutchinson*, 18 C. B. N. S. 445, 11 Jur. N. S. 297; *O'Hanlan v. Great Western R. W. Co.*, 6 B. & S. 484; *Williams v. Reynolds*, *Ib.* 495.

J. H. Cameron, Q. C., and *Crooks*, Q. C., supported the rule, citing *O'Hanlan v. Great Western R. W. Co.*, 6 B. & S. 484; S. C., 11 Jur. N. S. 797, 34 L. J. Q. B. 154, 12 L. T. Rep. N. S. 490; *Gee v. Lancashire and Yorkshire R. W. Co.*, 6 H. & N. 211; *Peterson v. Ayre*, 13 C. B. 353; *Hamlin v. The Great Northern R. W. Co.*, 1 H. &

N. 408; *Fletcher v. Tayleur*, 17 C. B. 21; *Smeed v. Foord*, 1 E. & E. 602; *Great Western R. W. Co. v. Redmayne*, L. R. 1 C. P. 329; S. C., 12 Jur. N. S. 692; *Sedgwick on Damages*, 2nd ed., 260; *Mayne on Damages*, 15; *Wilson v. Lancashire and Yorkshire R. W. Co.*, 9 C. B. N. S. 632; *Theobald v. Railway Passengers' Assurance Co.*, 10 Ex. 45; *Simmons v. South Eastern R. W. Co.*, 7 Jur. N. S. 849; Jur. March 31, 1866, p. 119, Leading Article.

DRAPER, C. J.—The facts of this case may present a new occasion for the application of a principle which is well established, and which I think must govern our decision—namely, “that where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time of making the contract, as the probable result of the breach of it.”—*Hadley v. Baxendale* (9 Exch. 341), referred to by Erle, C. J., in *Borries v. Hutchinson* (18 C. B. N. S. 445, 461.)

The plaintiffs claim a particular damage, the avoiding of which was one specified object of the contract between them and the defendant. The contract as stated in the declaration is established by the finding of the jury. It embraced the carriage of the plaintiffs' flour from Oshawa, in this Province, across Lake Ontario to Charlotte, in the State of New York, on two named days, the 15th and the 17th of March, 1866, and before the expiration of the Reciprocity Treaty, which would expire on the 17th of March, after which the flour would be liable to payment of duty. The declaration did not in precise terms state that in consequence of the breach of this contract by defendant the plaintiffs were put to a great expense in getting this flour into the United States, but the allegation of loss of profits may be treated as involving such a statement of damage in a different form of

words. For the cost of getting the flour into the United States market was increased by the precise amount of the duty, an amount which the plaintiffs had to pay *whether the price in that market rose or fell*, and this expense they would not have been subjected to if the defendant had fulfilled the contract, which he knew was made as to the time of its performance with the view of saving that expense. In treating that as a damage recoverable on this declaration and the evidence, we are in my opinion sustained by the authorities.

An allowance for increased freight and insurance occasioned by the delay of a vendor in fulfilling a contract was made in the case of *Borries v. Hutchinson* above cited, and the subject is fully discussed and the leading authorities are referred to.

The doctrine thereby established does not include *profits* which might have been made if the delivery had been made at the time agreed upon, and the apparent claim of profits lost by the non-delivery at first view led me to doubt whether the damages claimed were not on that account too remote, but taking the facts as proved in connection with the declaration, I think this claim is recoverable as a damage directly springing from the breach of contract.

The case in appeal, *Great Western Railway Co. v. Redmayne* (L. R. 1 C. P. 329), rests upon the same principle. There the defendants were held not to be liable for profits which the plaintiff would have made by a sale at the place where the delivery should have been made, because they had no notice of the object for which the goods were sent.

O'Hanlan v. The Great Western Railway Company (6 B. & S. 484), was an action for not delivering in a reasonable time. The point really decided was that the importer's reasonable profit on the expected sale of the goods may be added to the cost price, interest, and expense of transit, in estimating the damages for non-delivery, where there is no market in which the same sort of goods could be obtained, and so the price in that market be ascertained, at the place and time at which they ought to have been delivered. Here the damage is the additional expense in getting the goods

into the United States, where the plaintiffs intended to dispose of them.

Suppose that a similar breach of contract took place at a different season, when every day's delay rendered it more difficult to obtain the conveyance of goods and enhanced the premium of insuring them, the cost of transit would be increased, and that increase would afford the measure of damage. Here there is an additional cost, the result of the delay, without the payment of which the goods cannot be brought into the intended market; and the defendants contract to carry them by such a day as will avoid that increase. I think that additional cost affords, if not the sole measure, certainly an element in estimating the damages, and therefore was properly submitted to the jury. Under the peculiar circumstances of this case, I fail to see that the price in Canada of flour, or that in Charlotte or elsewhere in the United States, affects the plaintiffs' claim, which I think is fully upheld by *Borries v. Hutchinson*.

In my opinion this rule should be discharged.

HAGARTY J.—I think the plaintiffs are entitled to hold their verdict, on this ground: The contract was in substance to carry the plaintiffs' flour into the United States before a given time, at which a duty of so much per barrel would have to be paid by the importer. I at first thought that the fact of the price having risen rapidly from the 17th March, shewed that the plaintiffs were gainers instead of being damnified by the delay or default of defendant. But the plaintiffs had a right to have had their flour in the States at a time when they need not have paid the extra duty. For all we can see they may have intended to have kept it there, to take advantage of a rise in the market; in such a view their profit would clearly be lessened to the amount of the duty which they had to pay to get their property into that country.

I think the defence fails.

MORRISON, J., concurred.

Rule discharged.

MILLER V. CORBETT, HOPE, AND PARKE.

Sheriff—Recovery for false return—Subsequent action on covenant.

Where the plaintiff had recovered judgment against a Sheriff for falsely returning *nulla bona* to a *fi. fa.* on which he had made the money—*Held*, following *Sloan v. Creasor*, 22 U. C. R. 127; that he could not afterwards sue the Sheriff and his sureties on their covenant for not paying over such money. *

DECLARATION on a covenant, joint and several, entered into by defendant Corbett, Sheriff of the County of Frontenac, and the other two defendants as his sureties—that Corbett should pay to the person entitled to the same all moneys that he should receive by virtue of his office of Sheriff, and that he should not wilfully misconduct himself in his office to the damage of any person being a party to any legal proceeding. The declaration then averred that the plaintiff recovered judgment and issued a *fi. fa.* against the goods of one N., and delivered it to Corbett, who seized the goods and chattels of N., sufficient to satisfy, &c., and sold and made the moneys commanded by the writ, and falsely returned that N. had no goods, whereupon the plaintiff impleaded Corbett for such false return, and also for not seizing and selling N.'s goods, and recovered judgment against him for \$268 damages, and \$167.50 costs, and issued a *fi. fa.* against Corbett's goods, which was returned *nulla bona*. Averment that the plaintiff was entitled to receive the moneys from N., and was a party to the legal proceedings: that Corbett made the money out of N.'s goods, and had not paid the plaintiff.

Demurrer, because the plaintiff has already sued Corbett and recovered against him.

Gwynne, Q. C., for the defendant Hope, and *Britton* for the other defendants, supported the demurrer, citing 27–28 Vic. ch. 28, sec. 20; *Sloan v. Creasor*, 22 U. C. R. 127, as in point. They referred also to *McArthur v. Cool*, 19 U. C. R. 476; *Slade's case*, 4 Co. 94 b; *Phillips v. Berryman*, 3 Doug. 288; *King v. Hoare*, 13 M. & W. 504, 505.

McKenzie, Q. C., contra.

DRAPER, C. J., delivered the judgment of the Court.

The plaintiff can in this action recover nothing against Corbett to which the suit against the latter would not entitle him. As against him, therefore, this action is not sustainable. It is clear that, though the declaration does not in terms refer to the covenant as made under the statute, yet that it is so, for otherwise no liability to the plaintiff is shewn. Then the case of *Sloan v. Creasor* seems decisive in support of the defendants' contention.

Judgment for defendants.

LA POINTE, ADMINISTRATOR of BRAUGH V. THE GRAND
TRUNK RAILWAY COMPANY.

R. W. Co.—Contract to carry—Special conditions—Construction of.

The plaintiff signed a paper requesting the defendants to forward certain goods received from him at Toronto, to Indianapolis, in Indiana, "subject to their Tariff and under the Conditions stated on the other side." On the other side, headed "General Notices and Conditions of Carriage," the Company "gave public notice," that in certain events specified they would not be responsible. The tenth paragraph, after stating the course which would be pursued by them with respect to goods addressed to consignees resident beyond the places at which defendants had stations, proceeded, "And the Company hereby further give notice, that they will not be responsible for any loss, damage, or detention," to goods beyond their limits. It was found by the jury that all the goods had been delivered by defendants to a railway connecting at Detroit with their line, and running to Indianapolis.

Held, that the latter part of the sentence could not be regarded as a notice as distinguished from a condition; and that, whether a notice or a condition, it formed part of a special contract on which defendants received the goods, and by which they were exempted from liability.

The plaintiff was at Indianapolis when the goods (except the missing box sued for) arrived there, and remained until some time in the month following. *Held*, that he was resident there within the condition, and that having named himself as the consignee at that place he was estopped from denying such residence.

THE declaration in the first count charged the defendants as carriers of goods for hire, and that the intestate delivered to them at Toronto certain goods, to be carried by them to Indianapolis, in the State of Indiana, on their railway, and on certain other railways, and to be there delivered to intes-

tate. Breach, that defendants did not safely carry, &c., and that one box containing clothing, &c., was lost.

The second count charged that, in consideration that intestate delivered to defendants at Toronto certain goods to be carried thence to Detroit, in the State of Michigan, and there to be delivered by defendants to and upon another railway, to be forwarded to Indianapolis, subject to certain conditions indorsed on a receipt given by them, for hire to be paid by intestate for the whole journey to Indianapolis, defendants promised to carry said goods on their railway to Detroit, and there deliver them to the other railway, to be carried to Indianapolis, and there to be delivered to intestate. Averment of the delivery of the goods to the defendants, and payment by the intestate to the carriers, and that a reasonable time for delivery had elapsed. Breach, that though defendants carried and delivered part, they did not safely carry the remainder to Detroit, nor deliver the remainder on another railway, or to intestate at Indianapolis, or elsewhere, whereby the intestate lost one box, &c.

Pleas to first count.—1st. Not guilty. 2nd. That the goods were not delivered to defendants as common carriers, but that intestate by a shipping note requested defendants to receive the goods addressed to himself at Indiana, *via* Detroit junction, to be sent subject to defendants' tariff, and under conditions, amongst others, that all goods addressed to consignees resident beyond the places at which the defendants had stations, and respecting which no directions to the contrary should have been received previous to arrival at the stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the Company for want of opportunity to forward them, or they will, at the discretion of the Company by whom they may have been received, be suffered to remain on the Company's premises, or be placed in shed or warehouse (if there be convenience for receiving the same) pending communication with the consignees, at the risk of the owners, as referred to in other clauses of the said conditions, but that the delivery of the goods by the

(defendants) will be considered as complete, and the responsibility of the defendants will be considered to have ceased, when such carriers shall have received notice that the (defendants) are prepared to deliver to them the goods for further conveyance. And the Company hereby further give notice, that they will not be responsible for any loss, damage or detention, that may happen to goods so sent by them, if such loss, damage or detention occur after the said notice, or beyond their said limits: that upon the conditions so endorsed, of which the above is part, the intestate delivered the said goods to defendants, and they received them, and thereupon defendants gave intestate a receipt which on its face was subject to the conditions endorsed on the shipping note, and that under that special contract they within a reasonable time carried the goods to Detroit: that they have no station beyond Detroit on the route to Indianapolis: that the destination of the goods was in the State of Indiana, and beyond the defendants' limits, and that they have no station in Indianapolis: that the Michigan Southern and North Indiana Railroad Company connect with defendants' line at Detroit, and their line forms part of the route by which said goods were consigned, and that the Michigan Southern and North Indiana Railroad Company are public carriers for hire: that on the goods arriving at Detroit, the defendants, having no notice to the contrary, gave notice to the Michigan Southern and North Indiana Railroad Company, and afterwards delivered the said goods to that Company, and they accepted the same, for further conveyance by their railway, and that the loss happened after that notice, and beyond defendants' limits.

Pleas to second count.—1. Did not promise. 2. That the goods were by defendants safely conveyed to Detroit, and there delivered to the Michigan Southern and North Indiana Railroad Company, and by it and the connecting lines were carried to Indianapolis and there delivered to the intestate. 3. Similar to the second plea to the first count.

The plaintiff took issue on all the pleas, and replied to the second to the first count, that the alleged consignee was

not at the time of the delivery of said goods to defendants, or at any time, resident beyond the places where the defendants had stations on their railway, nor had intestate notice that defendants would not be responsible beyond their limits.

A like replication to the third plea to the second count.

Rejoinder to each special replication; that the special contract was made by the intestate signing and delivering to defendants the said shipping note, and requesting defendants to forward the goods expressly on the conditions pleaded, and by his receiving from defendants the receipt in the plea mentioned, which was subject to the same conditions, and that defendants accepted the goods on those conditions at the express request of intestate, and that he directed the goods to be delivered to him at Indianapolis, and defendants knew nothing of his place of residence, and that the taking effect of the contract and conditions were in no way affected by his place of residence. Issue.

The trial took place at the City of Toronto, in January, 1867, before Richards, C. J.

It appeared that on the 25th of September, 1866, the intestate signed a paper requesting the defendants to forward three cases, two boxes, one box containing a sewing machine and stand, which were addressed to himself at Indianapolis, Indiana, *via* Detroit Junction, "to be sent subject to their tariff, and under the conditions stated on the other side." On the other side was printed a heading, "General Notices and Conditions of Carriage. The Grand Trunk Railway Company give public notice," and then followed eighteen separate paragraphs, the first beginning, "That they will not be responsible for," &c. The tenth was the only paragraph upon which any question arose in this case. It is correctly set out in the plea, but the last sentence of it, beginning, "And the Company hereby further give notice," was wholly printed in italics. The defendants gave a receipt for these goods of the same date, and containing the same particulars as to packages and address as the request or shipping order; on this receipt the same conditions were endorsed.

The intestate's widow proved that one of the boxes was missing. She described it as a red box about two feet three inches high, the same width, and about five feet three inches long. The loss was discovered, as she stated, at Indianapolis. It had been packed by her in the beginning of June, 1865. It was missed about the 27th of October. She returned to Toronto, and enquired there after it in the latter end of November; and she, with her sister's aid, made up a list of the contents about the end of December, 1865, and fixed the value. She gave evidence of the contents and value in January, 1867. An account rendered to the intestate by the Indianapolis, Peru, and Chicago Railway Company, dated the 14th of October, 1865, was proved by her. It was for the transportation from Toledo of three cases, two boxes, and one sewing machine. She stated that she signed a receipt for the packages at Indianapolis, but it was not produced or evidence of its contents given.

It was sworn, on the defence, that the Railway Company at Indianapolis would not give it up. A witness also proved that the stand of the sewing machine was a separate article, and he swore he put a card on it. The defendants' freight checker at Detroit swore to his check marks on the bill relating to these packages, and said there were seven pieces, and he had no doubt they were delivered.

One Cody, a check clerk of the Michigan Southern Railway Company, from this bill which he had signed, swore that the goods were received and forwarded from Detroit to Toledo, and that they corresponded with the entry. The teamster who brought these goods with the bill from the defendants' station at Detroit, swore that he delivered all the goods in the list, and they were three cases, two boxes, one box, sewing machine, one stand. On the face of the Indianapolis account for freight was written, "The goods marked on this check are all that came here, viz., three cases, two boxes, and one sewing machine frame loose."

The learned Chief Justice left to the Jury the question of the delivery of the parcels receipted in Toronto by the

defendants to the Michigan Southern Railway Company at Detroit, and the value of the box alleged to be lost.

He reserved leave to defendants to move to enter a nonsuit, on the ground that by the receipt and the tenth condition endorsed thereon, assuming that the goods were actually delivered to the Michigan Southern Railway Company, the defendants' liability ceased; if the Court should be of opinion, on the facts proved and the contract, that they were not liable, a nonsuit to be entered.

The Jury found that the goods were delivered to the Michigan Southern Railway Company by the defendants, and they gave the plaintiff a verdict for \$250.

In Hilary Term *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why a nonsuit or verdict for defendants should not be entered, pursuant to leave reserved, or for a new trial, the verdict being contrary to law and evidence, and for misdirection, in leaving to the Jury the question of the defendants' liability when the evidence was all one way, that the defendants had carried the goods to Detroit, and in not directing the Jury that the plaintiff having declared on a contract to carry without limitation, and the contract proved being to carry safely subject to certain limitations, and to conditions that the defendants were not to be liable beyond their own line of railway.

In this term *Robert A. Harrison* shewed cause, citing *Wilby v. West Cornwall R. W. Co.*, 2 H. & N. 703; *Webber v. Great Western R. W. Co.*, 3 H. & C. 771.

M. C. Cameron, Q. C., supported the rule.

DRAPER, C. J., delivered the judgment of the Court.

I am somewhat taken by surprise at the form of this rule. My own minute only shews it to have been granted on the leave reserved at the trial, which was to move to enter a nonsuit, not a verdict for the defendants. As to the motion for a new trial on the ground of misdirection, the report of the learned Chief Justice does not refer to any exception

having been taken to his direction, nor to his having been asked to direct the Jury as the rule suggests. The only contention on the part of the defendants' counsel which is noted, is a suggestion of a doubt whether it was not to be inferred from the evidence that the intestate received the box in question at Indianapolis. I have not directed my attention to any part of this rule except that which asks for leave to enter a nonsuit, though for that purpose I have necessarily examined all the testimony reported.

If the Jury had found that every package receipted by the defendants at Toronto had been delivered not merely at Detroit, but also to the intestate at Indianapolis, we are not prepared to say the evidence would not have sustained them. We could not help noticing that in all the Toronto and Detroit documents put in evidence, the aggregate weight of all the packages is stated at 1085 lbs., while in the account rendered at Indianapolis the articles are stated to consist of three cases, two boxes, and one sewing machine, so far corresponding with the Toronto receipt, but omitting any notice of the stand of the sewing machine, but in a column in this account headed "weight," are the figures "1885," which, if pounds be meant, shewed 800 lbs more delivered at the end of the transit than were receipted at the beginning.

The principal question in this case is, whether the goods were delivered to and accepted by defendants on a special contract. Mr. Harrison endeavored to divide the matter endorsed upon the shipping order and receipt into notices and conditions, and argued that the plaintiff, though bound by any conditions, was not affected to the same extent by mere notices. We do not think this case presents an opening for such a distinction. On the face of each of these instruments are the words, "Under the *conditions* stated on the other side." The terms notices and conditions appear to be used as the language of the Company declaring on what understanding they contract to transport goods. The first six paragraphs declare certain facts or events in which they will not be responsible. What is this but making responsibility conditional—in other words, making a special

contract? The seventh, though varied in its form, tends directly to the same result, and so with regard to the eighth and ninth. The larger portion of the tenth is a declaration of the rules which will govern the transaction of a defined portion of their business, of the terms on which they will contract to do it; but it is urged that the latter part is only a notice, because the defendants invite special attention to it by premising that "the Company hereby further gives notice," and then adding that "they will not be responsible for any loss, damage, or detention, that may happen to goods so sent by them, if such loss, damage or detention occur after the said notice, or beyond their said limits." This sentence is only made intelligible by reference to the preceding words, and must be read incorporating one with the other, and thus incorporated it forms an element in the special contract of the defendants to carry.

Before the Carriers Act was passed in England, special notices brought home to the knowledge of the sender were held to limit the Common Law liability of the carrier, qualifying the acceptance of the goods to be carried, while here, if these be conditions, the intestate by his signature acceded to them, as part of the contract he offered on his part; if notices, he furnished conclusive evidence that he knew of their existence and with that knowledge put his goods into defendants' hands. In either view the defendants accept the goods repeating the same terms as part of their undertaking to carry. It is therefore a special contract binding on both. See *Hamilton v. The Grand Trunk Railway Company* (23 U. C. R. 600), where the authorities are collected.

It is however insisted that the intestate is not brought within the terms of the tenth paragraph, which begins "That all goods addressed to consignees resident beyond the places at which the Company have stations," &c. The objection is that the intestate was not proved to have been so *resident*. We think the objection more ingenious than solid. The packages were addressed as he ordered—to himself at Indianapolis. He was literally resident there when they arrived,

and received all but the box in question. He continued there, according to his widow's evidence, until some time in the month following that receipt. We think a temporary residence enough. Indeed the object seems rather the place of consignment in reference to the Company's stations, and that the consignee should be a person to be found at that place. There could be no motive for requiring more than that the consignee should be there at the time of the arrival of the goods. The term resident does not necessarily import permanence, nor yet any definite stay. The intestate, conscious of the condition, names himself as the consignee at Indianapolis, and goes and remains there till and after the goods arrive. It does not lie in his mouth to say he was not for the time being resident there.

We think the defendants were not liable on the facts proved, and therefore that the rule for a nonsuit should be made absolute.

Rule absolute.

FRASER ET AL V. THE GRAND TRUNK RAILWAY COMPANY.

Contract to carry—Special conditions—Variance—Damages—Proof of imposition of duties in United States.

The declaration charged defendants, in the first count, on a contract to carry certain wool from Cobourg to Boston within a reasonable time, subject to certain conditions endorsed on a receipt given by defendants, amongst others, that defendants should not be responsible for damages occasioned by delays from storms, accidents, or unavoidable causes, and alleging as a breach the neglect to carry. In the second count the contract was stated to be to carry within a reasonable time, and so that the wool should be imported into the States before the 17th of March, when the Reciprocity Treaty would expire. *Breach*, that defendants did not so carry, by which the plaintiffs were disabled from importing the wool into the States unless upon payment of duties.

As to the first count, it appeared by the defendants' receipt put in by the plaintiffs, that there was an additional condition, that as to goods addressed to consignees resident beyond the places where defendants had stations (as these goods were), defendants' responsibility should cease upon their giving notice to the carriers onward, that they were prepared to deliver the goods to them for further transport. *Held*, a substantial qualification of the contract declared on, which therefore was not proved as alleged.

As to the second count, the same receipt applied, which named no day for carriage into the States, but there was verbal evidence of an agreement to forward by the 17th of March. *Held*, that though this term might thus be added to the written contract, it would not dispense with the condition above mentioned, which shewed a substantial variance from the contract declared on.

The plaintiffs therefore were held not entitled to recover on either count.

The witnesses called to prove the imposition of a duty in the United States after the 17th of March, derived their knowledge only from printed circulars. *Held*, insufficient.

The wool was sent as far as Prescott, where it was to cross the St. Lawrence, but not having been sent over to Ogdensburg by the 17th, the plaintiffs gave no further instructions, and it remained at Prescott. *Held*, that though if a special contract to deliver within the United States by the 17th had been proved, the duty, if paid by the plaintiffs, might have been recovered as damages, yet it was their duty to enter the goods and pay it, and they could not hold defendants responsible for delay occasioned by their default.

DECLARATION against defendants as carriers of goods for hire. First count, on defendants' undertaking, for reasonable reward, to despatch and carry twenty-five bales of wool for the plaintiffs from Cobourg to the City of Boston, in the United States, and deliver the same in a reasonable time, subject to certain conditions endorsed on a receipt given by defendants, and, amongst others, that the defendants should not be responsible for damages occasioned by delays from storms, accidents, or unavoidable causes. And all conditions

were performed, &c., &c., yet defendants, although not delayed by storms, accidents or unavoidable causes, did not despatch the wool from Cobourg, nor carry and deliver the same for the plaintiffs within a reasonable time, but neglected to do so, whereby the plaintiffs were deprived of the use of the goods, to wit, hitherto, and of the profits to be derived from the sale at Boston, and the same were lost to the plaintiffs.

Second count, setting out that the Reciprocity Treaty was on the 17th of March, 1866, about to expire, and that defendants promised the plaintiffs, for a reasonable reward, to carry twenty-five bales of wool from Cobourg to Boston, and there deliver the same for the plaintiffs within a reasonable time, and so that in the course of such carriage the said goods should be imported into the United States before the expiration of the said treaty; and the plaintiffs delivered the wool to defendants, and defendants accepted it for that purpose, and on those terms; and though a reasonable time for the carriage and delivery had elapsed before the expiration of the said treaty, and all conditions, &c., &c., necessary to enable the plaintiffs to have the goods carried and imported by defendants into the United States before the expiration of the treaty were performed; yet defendants did not carry the same so that they were imported into the United States before the expiration of the treaty, nor carry nor deliver the same to the plaintiffs within a reasonable time, but failed to do so, whereby the plaintiffs were, and still are, disabled from importing the wool into the United States unless upon payment of duties, and the plaintiffs were deprived of the use thereof, to wit, hitherto, and lost large profits and the benefit of the expense incurred in preparing to receive the same at Boston.

Pleas.—1. As to the first count, did not promise.

2. To the second count, did not promise.

3. To first and second counts, that before defendants received the goods, the plaintiffs made and delivered to defendants a shipping note to the following effect: "Grand Trunk Railway, Cobourg Station, 1st March, 1866. The

Grand Trunk Railway Company will please receive the undermentioned property, in apparent good order, addressed to Wm. Hilton & Co., Boston, to be sent subject to their tariff, and under the conditions stated on the other side, (setting out particulars of the goods, weight, &c., being wool, growth and produce of Canada), which note was signed by the plaintiffs, and the following conditions were, among others, on the other side thereof. 1. That (the defendants) will not be responsible for any article or articles conveyed upon the railway, unless the same be signed for as received by a duly authorized agent, and a shipping note upon the regular printed form be presented to the agent, setting forth the description of the goods, and the parties to whom they were to be delivered. 3. Nor for damages occasioned by delays from storms, accidents or unavoidable causes, or for damages from the weather, fire, heat, frost, or delay of perishable articles, or from civil commotion. 5. Nor for loss or damage done to goods put into returned wrappers or boxes, or packages described as empties, nor for any goods left until called for or to order, warehoused for the convenience of the parties to whom they belong, or by or to whom they are consigned; and that the delivery of goods will be considered complete, and the responsibilities of the Company will be considered to terminate, when placed in the Company's shed or warehouse (if there be convenience for receiving the same) at their final destination, or when they shall have arrived at the place to be reached upon the railway of the Company. The warehousing of them will be at the owner's risk and expense, (except lumber, coals, bricks, and goods of like bulk and description, the delivery of which shall be complete, and the responsibility terminate, upon their being detached from the train whereby they have been drawn): that in the event of the Company being unable to store and warehouse goods received by them, it shall be lawful for them to place the same in any warehouse that may be available, at the risk and expense of the owner of the property so stored, and the charges of warehousing and conveyance shall form an additional lien upon said goods.

10. That all goods addressed to consignees resident beyond the places at which the company have stations, and respecting which no directions to the contrary shall have been received previous to arrival at the stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the Company for want of opportunity to forward them, or they will, at the discretion of the Company by whom they may have been received, be suffered to remain on the Company's premises, or be placed in shed or warehouse (if there be convenience for receiving the same) pending communication with the consignees, at the risk of the owners, as referred to in clauses numbers three and four; but that the delivery of the goods by the Company will be considered as complete, and the responsibility of the Company will be considered to have ceased, when such carriers shall have received notice that the Company is prepared to deliver to them the goods for further conveyance. And the Company hereby further give notice, that they will not be responsible for any loss, damage, or detention, that may happen to goods so sent by them, if such loss, damage, or detention, occur after the said notice, or beyond their said limits. 13. That they will not, under any circumstances, be liable for loss of market, or claims arising from delay or detention of any train, whether in starting or at any of the stations, or in the course of the journey. The Company do not undertake to send goods by any particular train if there be an insufficient number of cars at the station, or that the cars cannot be conveniently used for the purpose, or if from any cause cars loaded at a station are unable to be sent on by the trains passing or starting from such station:

That defendants received the goods on the request contained in the shipping note, and on the conditions stated, among which are those above set forth, and gave, and plaintiffs received from defendants, a receipt signed by their agent, as follows: "Grand Trunk Railway, Cobourg Station, 1st March, 1866. Received from A. Fraser & Co., the under-mentioned property, in good order, addressed to Wm. Hilton

& Co., Boston, to be sent by the Grand Trunk Railway Co., subject to their tariff, and under the conditions stated on the other side," (giving the number of packages, marks, &c., as in the shipping note): that the conditions referred to in this receipt are identical with those referred to in the shipping note signed by the plaintiffs, and contained those above set forth, and that defendants received the goods on those terms and conditions, and none other; that defendants' line of railway does not extend to the City of Boston, which the plaintiffs, when they made the shipping note, &c., well knew: that at the time of the receipt of the said goods there were three lines of communication which connected with defendants' railway and reached the City of Boston, on which certain public common carriers carried goods for hire, and by which defendants were in the habit of sending goods to Boston, consigned as the goods mentioned in the declaration were: that one of these connects with defendants' line at Prescott, in this Province, and was by way of Ogdensburg, in the State of New York, one of the United States; another connected at Montreal, and carried goods to Boston by way of Rouse's Point, in the said United States; and that the third was by way of Island Pond and Portland, in the said United States; and that all these premises were at the said time, &c., well known to the plaintiffs; that before and when the goods were received by defendants, a great many persons having goods to be shipped to the United States had delivered, and were delivering goods in such large quantities that a pressure of freight and of business on defendants' line was caused thereby, and the several points at which the defendants so delivered goods to the other lines communicating with their line and Boston were so blocked up with freight that, with all the despatch and exertion the defendants could and did use, goods were necessarily delayed in getting the same out of the Province into the United States and to the aforesaid points of connection, all which was also known to the plaintiffs; and in expectation that greater despatch could be given to the crossing of plaintiffs' said goods into the United States at Prescott, the

plaintiffs requested the defendants to send them by that route; that owing to the said pressure of business, and to storms and other unavoidable causes, defendants were unavoidably delayed a little in getting said goods to Prescott, but that with all reasonable despatch they conveyed the same to Prescott; that defendants, on the route by way of Ogdensburg to Boston, have no station beyond Prescott, and that another railway company, who are common carriers for hire, connect by steamer at Prescott and Ogdensburg with defendants' line; that in the usual course of business, and having no instructions to the contrary, and before the 17th of March, 1866, defendants gave such other company notice that they were ready to deliver to the said company so connecting with defendants' line; that owing to the extreme pressure of business, and to storms and other unavoidable causes, the other company were not ready to receive, and would not and did not receive the same from defendants until the said 17th day of March; that on that day the Government of the United States, in whose territory and under whose jurisdiction Boston and Ogdensburg were and are situate, required upon the said goods certain customs duties to be paid, and certain entries to be made by the plaintiffs on the said goods passing into the United States, without which, and the execution of certain powers of attorney by the plaintiffs, and the appointment by them of attorneys to attend to said entries, the defendants could not send forward the said goods to Boston, nor would said other railway companies, whose line formed part of the said route to Boston from Prescott by boat and Ogdensburg by rail, take or receive the goods from defendants at any time after the 17th of March up to this time, of all which premises the plaintiffs had notice; and defendants requested the plaintiffs to give them instructions what to do with said goods, but the plaintiffs refused to give any instructions, or to make any entries, or to pay any duties, or to do any act to enable such goods to be forwarded in accordance with their contract. And defendants say that they, by the means aforesaid, were prevented by the plaintiffs from completing the contract set out in this

plea, and they are and were ready and willing to complete their contract if the plaintiffs had done or will do the acts which will enable defendants to do so. The plea then stated similar difficulties and hindrances to forwarding the wool by either of the other routes to Boston, and that the wool mentioned in the first count, and that mentioned in the second, is one and the same lot of wool.

4th. To the second count, that defendants did not receive those goods on the terms or conditions in that count mentioned, *modo et formâ*.

The plaintiffs took issue on all the pleas.

The trial took place at Cobourg in October, 1866, before Morrison, J.

The plaintiffs proved that they delivered twenty-five sacks of wool at the Cobourg station, marked as stated in the receipt set out in the plea, worth at Cobourg fifty cents per pound, on the 1st of March, 1866. At that time wool was free of duty in the United States. After the 17th of March it became subject to duty on entering the United States, if worth over thirty-two cents a pound, of twelve cents a pound specific, and ten cents *ad valorem*. The receipt was put in signed by defendants' agent. It was preceded by the shipping note, which is also set forth in the plea, and which was also put in by defendants, signed by the plaintiffs' agent. The wool had cost the plaintiffs about forty-four cents per pound. After the 17th of March wool sold there at thirty-five cents per pound. The wool was still at Cobourg about the 5th or 6th of March. The plaintiffs sent a carter to the defendants' agent at Cobourg, and the carter told the agent to send away the wool, otherwise the plaintiffs would send it by boat. The agent replied they need not be in a hurry, there was plenty of time, and he told the carter to ask the plaintiffs which way they would like it sent over, and the carter came back and told the agent he might have it sent by Prescott or any other way, if he had it over by the 17th, and that if it was not sent away (from Cobourg) that day or the next the plaintiffs would send it by boat. The agent said he would engage he would have it over by

the 17th. The next morning the wool was gone. As it was not sent across by the 17th, the plaintiffs gave no further instructions about it, and it was left at Prescott, at the station near the St. Lawrence, where it was a few days before the trial. The duty on this lot of wool imported into the United States after the 17th of March, would have been \$848.90. The witnesses stated that their knowledge of the American duties was founded on what they read in the New York newspapers, and their evidence on this matter was therefore objected to.

This was the plaintiffs' case.

The defendants, after objecting that in point of law no case was made, gave evidence that at the time in question there was a very unusual press of business and collection of freight at Prescott, to be conveyed to the United States. The defendants have a station there called the Prescott Junction, where the line of the Prescott and Ottawa Railway crosses the defendants' line, at which junction freight intended to cross the St. Lawrence is transferred from the defendants' railway to the other. The defendants have an extra rail from the junction to the station at the river, but that station is controlled by the Prescott and Ottawa Railway Company. The sidings at the junction were filled with cars. In ordinary circumstances the business does not exceed from thirty to fifty cars a month crossing the river, but in March, 1866, they took over 700 cars. Freight was usually taken over by the Ogdensburg Railway Company by a ferry boat, which will carry six cars. The agent of the Ogdensburg Railway Company was aware that this wool was at Prescott. The defendants, in addition to the ferry boat, employed two schooners and two scows, which had to be cut out of the ice, in order to get freight across the river. The defendants also hired extra men, ten or twelve in all, and worked night and day. They had an extra engine at Ogdensburg to draw the cars off the ferry boat.

On the 17th of March the ferry boat ran all day and up to eleven at night. The ice was coming down the river, and a storm of wind began about nine o'clock that evening, which

drove the ice, so as to prevent access to the docks and wharves on the American side. The ferry boat returned to Prescott with six cars on board, which could not be landed. About eighteen other cars were also at the station, and it was sworn that but for the storm all would have been ferried over on the 17th. The great press of business at Prescott was between the 10th and 17th. The wool arrived at the junction on or about the 12th. It was placed on a siding, which some of defendants' witnessess said was the only one on which it could be put. Cars arriving afterwards were put on the same siding, and had to be moved before the car containing the plaintiffs' wool was reached.

One McDougall, who acted for the plaintiffs, carted the wool down from the freight house to the slip on the 16th, about sixty feet from the ferry boat dock. The defendants' agent intended to have sent it by the ferry boat, and spoke to the captain of it about taking it. He put it off until he had carried over the cars, as he said the loading and unloading the bales would delay him, and the wool could remain on board all night. During the pressure, about the 10th of March, the ferry boat carried on an average about sixty cars a day across the river. Some freight which arrived at the junction after the plaintiffs' wool was put on the same siding, and was probably sent across from Prescott first. One of the defendants' witnesses told McDougall he had carted the wool to the wrong place. The siding at the junction will hold 150 cars. The station master at Cobourg swore that he did not engage that the wool should go across the lines before the 17th March; that he told the plaintiffs there would be great difficulty, and he could not engage to get it across; that he had no authority to contract except as stated on the back of the receipt.

In reply, the plaintiffs called Mr. McDougall, who proved that he pressed Mr. Leslie (an employee of the defendants at Prescott) on the 15th to send the wool over. The ferry boat was going over daily with cars, but not loose freight. Most of the cars which reached the junction on the 16th of March, were taken over on the 17th in the evening.

McDougall carted the wool down on the evening of the 16th, and next morning again spoke to Mr. Leslie about sending it across, and he said it would go across. McDougall had ten cars loaded with flour belonging to his father to ship, which was taken across on the evening of the 17th.

The learned Judge told the Jury that the contract under which the wool was delivered to the defendants was contained in the shipping note and receipt, and that one question was whether the wool was carried under that agreement. If so, they must determine whether the defendants used due diligence, and conveyed it within a reasonable time to Prescott. If they did so, on the arrival of the wool there it was the plaintiffs' duty to make the necessary arrangements for passing it through the United States custom house, so as to enable defendants to pass it to its destination. If they omitted to do so, as the wool was still at Prescott subject to their order, the plaintiffs were not entitled to recover.

But if the Jury thought the wool was not to be carried under the written contract, but under a substituted contract for carrying the wool within a reasonable time, so that it would be imported by the 17th of March, 1866, they would say, first, was such a contract proved and, did the defendants fail to carry it out, and was it by reason of their neglect that the wool could not be imported into the United States free of duty. If so, the Jury must say what damage the plaintiffs suffered, and whether to the extent claimed, viz., the amount of the duty. He also asked them, if they found for the plaintiffs, to say under which contract; and in the event of their finding on the verbal or substituted contract, the defendants had leave to move to enter a verdict for them, if the Jury should have been told there was no evidence to prove that contract.

The Jury gave a verdict for the plaintiffs and damages \$700, and stated that they found for the plaintiffs on both contracts.

In Michaelmas Term, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiffs to shew cause why there should

not be a new trial on the law and evidence, for excessive damages, for misdirection, and the reception of improper evidence. The misdirection complained of was the leaving it as a question of fact to the Jury, whether the defendants had not made a parol contract with the plaintiffs to carry the wool different from the written contract proved, and in not telling the Jury that there was no other contract but the written one, and that under the written contract the defendants were not liable, and that the evidence did not sustain the declaration, and that there was no legal evidence of the duty charged on wool in the United States, and that the Jury should have been told the defendants were not liable for the amount of duty as damages; and that the evidence of the United States duty, being the knowledge of witnesses derived from printed circulars, was improperly received, and the finding of the Jury that the wool was carried on both contracts was absurd.

In this term *Robert A. Harrison* shewed cause, citing, as to the damages recoverable, *Watrous v. Bates*, 5 C. P. 366; *Hadley v. Baxendale*, 9 Ex. 341, 354; *Fletcher v. Tayleur*, 17 C. B. 21.

M. C. Cameron, Q. C., contra, cited *Milligan v. Grand Trunk Railway Company*, 17 C. P. 115; *Spettigue v. Great Western Railway Company*, 7 Ex. 699; *Peninsular, &c., Steam Company v. Shand*, 12 L. T. Rep. N. S. 808.

DRAPER, C. J., delivered the judgment of the Court.

In *Lapointe v. The Grand Trunk Railway Company*, (a), we had occasion to consider the same distinction which is now attempted, that some only of the matters indorsed upon the receipt are conditions, and the rest mere notices. We adhere to the opinion then expressed, that there is no room for such a distinction. I refer in confirmation of what I then said to the *Peninsular, &c., Steam Navigation Company v. Shand*, 3 Moo. N. S. 272.

The contracts set out in the first and second count differ materially. The breach in the first count is, not dispatching

(a) *Ante* p. 479.

the wool from Cobourg, and not delivering the same for the plaintiffs as aforesaid, *i.e.*, at Boston, within a reasonable time, although not delayed by storms, accidents, or unavoidable causes. In the second count the breach is, that the defendants did not carry the wool so that it was imported into the United States before the expiration of the treaty, *i.e.*, by the 17th of March, 1866, nor carry nor deliver the same to the plaintiffs within a reasonable time.

A contract to carry and deliver within a reasonable time is a very different thing from a contract to convey by a certain named day (when time is of the essence of the contract) and then to carry onward and deliver at another place within a reasonable time.

Then how does it stand upon the evidence? The plaintiffs in support of their first count put in the receipt given by the station master at Cobourg, which, in addition to the conditions stated in the declaration, subject to which the defendants undertook to carry, namely, that they were not to be responsible for delays arising from storms, accidents, or unavoidable causes, contains another (the 10th) which materially explains and limits the character of their undertaking, and shews that though *primâ facie* they agreed to carry from Cobourg to Boston, yet as to goods addressed to consignees resident beyond the places at which the defendants had stations, their responsibility ceased upon their giving notice to some proper party that the defendants were prepared to deliver the goods into their hands for further transport. This is a substantial qualification of the contract declared upon, because it shews that the defendants' liability might cease before delivery to the plaintiffs, although they were not delayed by storms, &c.; in other words, they would be discharged without an actual carriage to and delivery at Boston, which this count states to be in the state of Massachusetts. The contract proved is not therefore the contract declared upon. The breach laid may be true and yet the defendants may have fulfilled their undertaking in the terms of the tenth condition. The plaintiffs do not therefore entitle

themselves to recover on the first count. They prove a different contract from that stated.

Without the aid of the receipt there is no proof to support that part of the second count which states the defendants' promise to be to carry the wool from Cobourg to Boston "aforesaid," and to deliver the same there in a reasonable time. There is not a word in the witness's evidence, (the carter) which speaks of more than a contract to forward the plaintiffs' wool then in the defendants' possession at Cobourg by way of Prescott into the United States by the 17th of March. The plaintiffs cannot by this evidence either dispense with the receipt or ignore their shipping note, which asks to have the wool forwarded under the self-same conditions. Though the parties might add a verbal term to their written contract, to provide for the wool being carried into the United States by a certain day, the contract would remain in other respects unaltered; it would still be subject to the defendants' "tariff, and under the conditions stated on the other side," whereas it was declared upon as an unqualified contract to import into the United States by the 17th March, and to convey to Boston in a reasonable time. And the finding of the Jury for the plaintiffs upon both counts, though indicative of a strong wish to ensure their recovery, does not remove the difficulty, that to whichever count the evidence is applied it proves a contract materially differing from that or those declared upon.

As the verdict was rendered "*on both contracts*," the leave reserved becomes of no value, and we can only relieve the defendants by granting a new trial. For though we are of opinion that there was no legal evidence that the duties stated or any duties had been imposed upon wool imported into the United States, yet that evidence went only to the *quantum* of damages, and if the defendants had committed any breach of contract, the plaintiffs would have been entitled to nominal damages at all events.

Although the terminus of the transit is out of this Province, yet the ordinary liabilities of a common carrier will attach,

in the absence of any agreement or stipulation to the contrary—*Crouch v. London and North Western Railway Company* (14 C. B. 255); but if, as in the present case, the carrier undertakes expressly to carry to the ordinary terminus of his transit, and stipulates that without any prolonged liability he may transfer the goods to an ulterior carrier for the purpose of being forwarded, he will not be liable for damages accruing after such transfer—*Fowles v. Great Western Railway Company* (7 Ex. 699). The attention of the Jury does not appear to have been drawn to that part of the tenth condition, “that the responsibility of the Company will be considered to have ceased when such carriers, *i. e.*, those by whom the goods are to be forwarded onward from the terminus of the transit over the defendants’ line) “shall have received notice that the Company is prepared to deliver to them the goods for further conveyance,” in connection with the evidence relative to the ferry boat, under whose control it was, and with the application to the captain to receive and take over the wool, and the cause of its not being moved before the expiration of the 17th March.

As to damages, if a special contract were proved to deliver within the United States territory by a certain day, the breach thereof might subject the defendants to the very damages claimed, as being such as it might be reasonably supposed were in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it, according to the principle of the well-known case of *Hadley v. Baxendale* (9 Ex. 341), (a). This contract, on the plaintiffs’ own shewing, did not contemplate that the defendants were to do anything towards the importation of the wool into the United States beyond carrying it there by a fixed day, and although that was not done, the goods might still have been forwarded to Boston, the fiscal regulations being first complied with. Assuming that for duties thus necessarily paid the defendants must have answered to the plaintiffs, still it was the duty of the latter to pay

(a) See *Gibbs et al. v. Gildersleeve*, *ante* p. 471.

them, and they could not hold the defendants responsible for a delay of which they (the plaintiffs) were the proximate cause. As to the question of the value of the goods in a foreign market, as affording the measure of damages, we are not called upon to enter into it. There may arise a question from the difficulty of ascertaining correctly the state of such market.

As we are of opinion neither count was proved, that the contract offered in evidence was not the contract declared on, and that such should have been the direction at the trial, we think there should be a new trial without costs.

Rule absolute.

DOYLE V. WALKER.

Innkeeper—Rights of

An innkeeper has the sole right to select the apartment for a guest, and, if he finds it expedient, to change it and assign him another. He cannot be treated as a trespasser for entering to make the change.

A guest who has been received loses the right to be entertained if he neglects or refuses to pay upon reasonable demand.

TRESPASS for breaking and entering certain apartments in the possession of the plaintiff and his family, in the American Hotel, in the City of Toronto, and taking plaintiff's goods in the said apartments. Second count, for taking plaintiff's goods and detaining the same, whereby the plaintiff was greatly incommoded.

Pleas 1. Not guilty. 2. To first count, that the apartments were not the plaintiff's. 3. That (as to first count) at the time when, &c., defendant was possessed of the apartments, and plaintiff's goods were wrongfully therein, incumbering the same, and doing damage to defendant, wherefore he removed them, &c.

4. To second count, did not seize and detain plaintiff's goods. 5. Leave and license. Issue upon all the pleas.

The trial took place at Toronto, in May last, before Hagarty, J.,

The plaintiff occupied two rooms, Nos. 58 and 59, in the hotel mentioned in the declaration, and kept by defendant. Plaintiff's family consisted of himself, his wife, two female servants, and three young children. His wife had been confined not long before going there, and was in bad health. He was charged by the day, \$2 each for himself and wife, \$1.50 for each servant, and \$1.50 for the children. He became indebted to defendant, and bills were rendered from time to time and payment demanded, and he was told he must leave unless he paid up. On the 18th of September, the plaintiff owed \$83.25. He was told he must quit. He said he was going, that he was anxious to leave if his wife's state would allow of it. The Provincial Fair or Exhibition was near at hand, and the plaintiff was asked to let defendant have No. 59, which was occupied by plaintiff and his wife, as he wanted the use of it during the exhibition; and a clerk of defendant's swore that the plaintiff consented. On the 21st of September, the plaintiff owed \$109.15. He said he was going to leave, and asked for the bill, which was rendered by 2, p.m. that day. But on that morning defendant had gone into that room, no person being in it at the time, and he put up some additional beds and removed the plaintiff's trunks and property out of it. This was the trespass complained of. Plaintiff was not in the hotel at the time, but was at his office in town, where defendant's clerk had gone to him and demanded payment, when plaintiff said he was going to leave. The bill was not paid until that evening. Plaintiff kept the other room, No. 58, and continued to board at the hotel with his family till the 29th of September, but he slept elsewhere.

The learned Judge held that if a guest at an inn did not pay as required for the use of his room, the landlord might require possession, and might take possession, using no unnecessary force. It was insisted for the defendant that trespass would not lie against an innkeeper for going into

one of his rooms and removing his guest's furniture in his absence.

The jury found for the plaintiff, damages \$100. Nothing was said as to the particular issues.

S. Richards, Q. C., obtained a rule calling on the plaintiff to shew cause why there should not be a new trial without costs, or with costs to abide the event, the verdict being against law and evidence : that the plaintiff shewed no right as against defendant to the possession of the apartment in question, and that trespass would not lie : that if the plaintiff had at any time a right to maintain trespass by reason of his possession, he had no such right his bill to defendant being unpaid though demanded. Or for misdirection, in ruling that the plaintiff had such a possession and right to possession as to enable him to maintain trespass under the facts proved against the defendant, for entering the apartment during the day, the door being open, and the room not being in the immediate actual possession of the defendant or any of his family, and in ruling that the plaintiff was entitled to recover unless he was in arrear and he had neglected or refused to pay.

M. C. Cameron, Q. C., shewed cause. The question is whether a guest in possession of a room at an inn can maintain trespass against the innkeeper who enters it to turn him out; and it is contended that he can. The obligation of an innkeeper is strict. It is held that there may be different kinds of innkeepers, who cannot be compelled to take guests except of the class they profess to have accommodation for, but here the plaintiff belonged to a class which would frequent such an inn, and would expect to have a separate room; *Kirkman v. Shawcross*, 6 T. R. 17; *Farnworth v. Packwood*, 1 Stark. 249; *York v. Grindstone*, Salk. 388. His possession was sufficient to entitle him to maintain trespass, *Lane v. Dixon*, 3 C. B. 776.

S. Richards, Q. C., contra. There is no precedent for such an action against an innkeeper for entering a room in

his own inn. The cases of *Cashill v. Wright*, 6 E. & B. 890, and *Morgan v. Ravey*, 6 H. & N. 265, shew that an innkeeper is liable if any one gets into a room in his house, though occupied, because it is his room and in his possession. If so, how can he be liable in trespass for entering it? [HAGARTY, J.—Is the common law right of guests more than a right to enter generally, leaving the landlord to apportion the rooms? A man may have a right to go into a parish church, but not to the exclusive possession of any part.] No, *Fell v. Knight*, 8 M. & W. 269, shews that, though entitled to accommodation, the guest cannot select any particular apartment. *Holder v. Soulby*, 8 C. B. N. S. 254, shews the liability of an innkeeper as distinguished from a boarding-house keeper. Then, in an indictment for burglary in breaking into an inn, the house must be alleged to be the landlord's, and if a particular room be broken into it is alleged to be the landlord's not the guest's—2 East P. C. 502, 503; Russ. C. & M. 34. This affords a strong argument in the defendant's favor. [*M. C. Cameron*, Q. C.—Then, if so, the landlord might put another man into the same bed with a guest.] Very likely. The guest might go out, and sue him for not providing sufficient accommodation, but that would be his only remedy. At all events, the plaintiff's occupation was only as under a license revocable, and he cannot maintain trespass—*Wood v. Leadbitter*, 3 M. & W. 838; *White v. Bayley*, 10 C. B. N. S. 227, shews that trespass will not lie without some estate in the land. *Lewis v. Ponsford*, 8 C. & P. 687, somewhat resembles this case in the facts. Then here the plaintiff was clearly in arrear and had no right to be in the inn, as the Judge ruled. *Rex v. Ivens*, 7 C. & P. 213, as to the necessity of tendering the proper charge before the innkeeper can be made liable, is questioned, if not overruled, in *Fell v. Knight*, 10 M. & W. 276, already cited. The damages given are excessive, for no actual damage was proved.

DRAPER, C. J., delivered the judgment of the Court.

The plaintiff neither asserts nor proves any special contract. He rests his case upon what he assumes to be his

right resulting from his being a guest in an inn, and the defendant being the innkeeper. He assumes that having been let into possession of a room, he has acquired such an exclusive right of possession as against his landlord, so long as he continues to occupy it, that the latter is liable as a trespasser for entering and removing his trunks out of it.

We do not so understand the law. The contention appears to us to be inconsistent with the well settled duties, liabilities, and rights of the innkeeper. Whatever may be the traveller's rights to be received as a guest, and to be reasonably entertained and accommodated, the landlord has, in our opinion, the sole right to select the apartment for the guest, and, if he finds it expedient, to change the apartment and assign the guest another, without becoming a trespasser in making the change. If, having the necessary convenience, he refuses to afford reasonable accommodation he is liable to an action, but not of trespass. There is no implied contract that a guest to whom a particular apartment has been assigned shall retain that particular apartment so long as he chooses to pay for it. We think the contention on the plaintiff's part involves a confusion between the character and position of an innkeeper and a lodging housekeeper.

It appears to us further, that although the innkeeper is bound to receive, the guest must not only be ready and willing, and before he can insist as of right to be received that he must offer, to pay whatever is the reasonable charge; and that a guest who has been received loses the right to be entertained if he neglects or refuses to pay upon reasonable demand. The plaintiff's bill accrued due *de die in diem*, and had been in arrear though frequently demanded.

On both points we think upon the evidence the plaintiff failed, and that there should be a new trial without costs.

Rule absolute.

CAMPBELL V. PETTIT.

Ejectment—Practice.

In ejectment it is not necessary to annex the notices of title on either side to the issue book.

THIS was a rule calling on the plaintiff to shew cause why the notice of trial, and the issue book, and the services thereof, and the verdict obtained, should not be set aside with costs, for irregularity, on the grounds: 1. That there was no proper issue book delivered with the notice of trial, according to the practice of the Court. 2. That the issue book delivered with the notice of trial omitted the notice of the defendant's title; and lastly, that although notice of the irregularity was given, the plaintiff proceeded to trial and took a verdict. The defendant filed no affidavit of merits.

M. C. Cameron, Q. C., shewed cause, and cited *Ch. Arch. Prac.* 10th ed. 289.

Boyd supported the rule, citing *Grimshaw v. White*, 12 C. P. 521; *Harrington v. Fall*, 15 C. P. 541; *Reeves v. Eppes*, 16 C. P. 137; *Worthington v. Wigley*, 5 Dowl. 209; *Wilson v. Nesbitt*, 1 Dowl. N. S. 675; *Cotton v. Thompson*, 5 Jur. 270.

MORRISON, J., delivered the judgment of the Court.

The question raised on this application is whether it is necessary to attach to the issue book or deliver with it copies of the notices of the plaintiff's and the defendant's titles, or either of them.

No authority was cited nor can we find any decision to the effect that the issue book in ejectment must have the notices of title attached to or inserted therein. The 16th section of the Ejectment Act, Consol. Stat. U. C., ch. 27, which points out the mode of drawing up the issue, is silent on the subject, and the forms given under that section as a guide make no reference to the notices of title. The only notice referred to is the one limiting the defence, nor can we find in

Archbold's Practice or the Forms, or in Cole on Ejectment, any observation to lead us to suppose that these notices accompany or form any part of the issue, or that it is necessary, or the practice, to attach or serve them.

The necessity for annexing them to the record arises from the provisions of the 21st section of the Ejectment Act, which enacts, "If no special case be agreed to, the claimants may proceed to trial in the same manner as in other actions, and the particulars of the claim and defence, and of the notices of claimant and defendant of their respective titles, if any, or copies thereof, shall be annexed to the record by the claimants."

In ordinary cases issue books do not require to have the particulars of demand or set-off attached, although, under a rule of Court, such particulars must be attached to the record at the time of its entry for trial.

In *Harrington v. Fall* (15 C. P. 545), referred to on the argument, one of the objections there taken was that the record did not agree with the issue book, but the Court in that case did not decide that it was necessary, nor was the point raised, that the notices of claim of title should be served with the issue, or that they formed part of it. What was incidentally said by the Court was, that when a notice of title was served with the issue professing to be a copy of the defendant's claim, if it was not a copy, that then the defendant ought to have had it amended at the expense of the plaintiff.

We have now, however, to decide whether the delivery of the issue book without these notices is an irregularity, and in the absence of any authority we see no good reason for holding that the issue book should be accompanied by or contain anything more than that specified in the 16th section of the Ejectment Act, and the form prescribed by that Statute; and therefore this rule must be discharged.

Rule discharged.

MOFFAT V. FOLEY, EXECUTRIX.

Set-off.

Declaration against the executrix of F. a Division Court Clerk, on the covenant entered into by him and his sureties, for non-payment of money collected by him.

Plea, on equitable grounds, set-off for money due to the defendant as executrix, on a judgment recovered by her as such executrix against the plaintiff, for goods sold, money lent, &c., by the testator to the plaintiff. *Held*, a good defence.

THIS was an action brought against the defendant as executrix of James Foley. The first count of the declaration stated that the testator in his life time, as Clerk of a Division Court, together with A. and B., his two sureties, by his writing obligatory, sealed with his seal, and with the seals of his sureties, according to the statute, did covenant and promise jointly and severally with his sureties, for himself and for his heirs, &c., that he, the testator, should duly pay over to such person or persons as should be entitled to the same, all such moneys as he should receive by virtue of his office, and should well and faithfully do and perform the duties imposed upon him as clerk, &c. Averment, that the plaintiff placed in testator's hands as clerk, &c., for collection, claims against divers persons, and that divers sums of money were paid to and came into the hands of the testator as such clerk on account of the said claims, &c., to wit, to the amount of £400, and that the testator in his lifetime did not, nor defendant since his death, pay over, &c.

Fourth plea, on equitable grounds, that the plaintiff before and at the commencement of this suit was and is still indebted to the defendant, as executrix as aforesaid, in the sum of £111 12s. 1d., upon a judgment recovered by the defendant as such executrix against the plaintiff, in the Court of Common Pleas, &c., which judgment was set out at length in the third plea, and for the causes of action therein mentioned, and which were for goods sold, money lent, &c., by the testator to the plaintiff, &c., which judgment still remains in force and unsatisfied, &c.

Demurrer to the fourth plea, in so far as it relates to the

first count, and to so much as alleges that the plaintiff at the commencement of this suit was, and still is, indebted to the defendant as executrix upon the judgment recovered against the plaintiff. The causes of demurrer assigned were, that the judgment cannot be pleaded by way of set-off, and is no answer, either in law or equity, in the absence of an agreement between the parties, to a claim against a Clerk of a Division Court arising out of the covenant entered into by him under the statute; that the plaintiff's claim under such covenant and the judgment debt are not mutual debts or claims between the parties, nor between the testator and the plaintiff, and cannot be set off against each other at law or in equity.

Hector Cameron for the demurrer, cited *Burnham v. Manners*, 2 U. C. R. 94; *Kingsmill v. Bank of Upper Canada*, 13 C. P. 600; Sm. Lea. Cas. Vol. II. p. 359, 6th Ed.; *Hutchinson v. Sturges*, Willes 261; S. C. *Montague* on Set-off, App. 4; Buller, N. P. 179. *Watts v. Rees*, 9 Ex. 696; S. C. in Error 11 Ex. 410.

C. S. Patterson, contra, cited *Birch v. Depeyster*, 4 Camp. 385; *Gingell v. Purkins*, 4 Ex. 720; *Fletcher v. Dyche*, 2 T. R. 32; *Legge v. Harlock*, 12 Q. B. 1015.

MORRISON, J., delivered the judgment of the Court.

This is substantially an action to recover moneys received by the testator to the use of the plaintiff, although the plaintiff has thought proper to pursue his remedy for the recovery of the amount by suing on the covenant entered into by the testator under the Statute, to which the defendant pleads on equitable grounds that she, as executrix, sued the plaintiff for moneys, &c., due by the plaintiff to the testator in his lifetime, and recovered a judgment as executrix against the defendant, and she claims to set off against the plaintiff's claim the amount so recovered.

We see no force in the argument that because the testator received the moneys sued for in this action for the use of the plaintiff in the capacity of Clerk of a Division Court,

that against a debt so incurred the defendant should not be allowed to set off a debt owing by the plaintiff to the testator in his lifetime. If the action had been against the testator himself, it might have been properly urged that as a clerk he ought not to mingle his private and official money transactions, and that as a matter of public policy he should be compelled to pay over all moneys received by him in his official capacity to his debtor, irrespective of moneys due by the debtor to him; but the case is very different when we consider the light in which this defendant as executrix stands, and her duty and liability in respect of the assets of the estate.

In *Lechmere v. Hawkins* (2 Esp. 626), where the defendant borrowed money of the plaintiff, his debtor, under an express promise to pay it, without noticing the debt the plaintiff then owed, or affecting to set one demand against the other, it was argued that the defendant was bound to make absolute payment under the express promise; but Lord Kenyon said "he knew no such law, nor did he think there was any such legal obligation on the creditor; it might be an honorary obligation, and such as a man who gave it ought to observe, but if he thought fit not to consider such an obligation as binding, he could not compel him. There were mutual subsisting demands at the time of the action brought, and such as the Statutes of set-off gave the party defendant power to set against the plaintiff's demand. Besides this, if he was to refuse the set-off here, it would drive the defendant into a Court of Equity, where the judgment obtained here would be set off against the debt admitted to be due by the plaintiff to the defendant." That case is cited and acted upon by the Lord Chancellor in *Taylor v. Okey* (13 Ves. 180), also a case of set-off, and in which an injunction had been granted.

The words of the clause of the Statute affecting this case are these: "Where there are mutual debts between the plaintiff and the defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set

against the other"—2 Geo. II. ch. 22. The object of the act was to put an end to cross actions, and when the Statute was made perpetual by 8 Geo. II., ch. 24, it was amended to set at rest doubts as to its application to debts which in law would be deemed of a different character. The debts here originally existed between the plaintiff and the testator, and were mutual debts at the time of the testator's death, and the representative of the one could set off her testator's debt against that of the other.

It seems to us that it would be a very narrow distinction, if we were to hold that a debt which could have been set off before it was converted into a judgment, could not be set off because it was so converted. The recovery of the judgment does not destroy the mutuality of the debt, it only provides the highest kind of evidence of the existence of the debt.

In *Blakesley v. Smallwood* (8 Q. B. 538), Lord Denman, in giving judgment, says: "A plea which shews that the testator in his lifetime had a demand against the plaintiff greater than, or equal to, the damages, from the alleged breach of the promises in the declaration, and that the same was due and owing at the commencement of the suit (which this plea alleges) to the defendants as executors, does disclose a sufficient defence, and is, we think, an answer to the action." In that case the plaintiff sued the defendants as executors, on an account stated between the plaintiff and defendants as executors, and promise by them, to which the defendants pleaded a set-off of money, &c., due by the plaintiff to the testator in his lifetime, and it was objected on demurrer, that to an account stated by the defendants a set-off of a debt due from the plaintiff was no answer. That case decides, as said by Coleridge, J., in *Rees v. Watts* (11 Ex. 410), where this question of set-off is a good deal discussed, "that an account stated by an executor as such, must be taken to shew a debt due from his testator to the other party, and against this it is clear that a debt due from that other party to the testator may be set off." So, in like manner, the judgment set out in this plea shews a debt due from the plaintiff to the testator in his lifetime, and on principle the same result should follow.

Again, it cannot be denied that if the plaintiff in this action recovered a judgment against the defendant, that this Court would, on motion, upon the application of either party, set off one judgment against the other. And it is equally clear, that if the plaintiff filed a creditor's bill in equity against the defendant for an account, that the Court would set off this judgment against any claim of the plaintiff sought to be recovered from the testator's estate.

On the whole, we are of opinion that the pleadings shew that there were mutual subsisting demands at the time of the bringing the action, and such as the statute enabled the defendant to set off against the plaintiff, and that our judgment should be for the defendant.

Judgment for defendant.

IN RE WOOD.

Fi. fa. against Reeve returned nulla bona—Application for quo warranto—Evidence.

An application for an injunction in the nature of a *quo warranto* against a Reeve for usurping the office, on the ground that a *fi. fa.* against him had been returned *nulla bona*, was founded only on an affidavit that one D. had recovered a judgment against him, on which a *fi. fa.* issued and was placed in the Sheriff's hands, and returned by him *nulla bona*.

Held insufficient, for it should have been shewn how and to whom the return had been made, and the writ and return should have been produced or proved. The rule *nisi* was therefore discharged with costs.

Britton obtained a rule calling on the defendant Wood to shew cause why an information in the nature of a *quo warranto* should not be filed against him for usurping the office of Reeve of Loughborough, in the County of Frontenac, on the ground that a *fi. fa.* against his goods issued in February last, in a suit in the County Court of the County of Frontenac, wherein one Day was plaintiff and the said Wood defendant, and which *fi. fa.* was placed in the hands of the Sheriff of Frontenac to be executed, and was returned by said Sheriff *nulla bona*.

The application was made under the provisions of the 124th section of the Municipal Institutions Act of 1866, which enacts, that in case a member of council be convicted, &c., or in case a *nulla bona* has been returned against him, &c., his seat in the council shall thereby become vacant.

The only affidavit filed was that of Marvin Holden, the relator, who swore that Wood was duly elected Reeve of Loughborough on the 7th of January last, and as such Reeve acted since that day, and also took his seat in the County Council of Frontenac, &c., and that he continued to usurp and hold the respective positions of Reeve, &c.: that one Day recovered a judgment against Wood in June, 1864, in the County Court for \$340, upon which judgment a *fi. fa.* against Wood's goods issued, and was placed in the hands of the Sheriff of Frontenac, and that on or about the 30th day of March, 1867, said *fi. fa.* was returned by the Sheriff *nulla bona*, &c.

Gwynne, Q. Q., shewed cause, contending that the affidavit was insufficient: that it did not shew that the *fi. fa.* was placed in the Sheriff's hands for execution, and that it did not appear that the *fi. fa.*, had ever been returned.

Britton supported his rule.

MORRISON, J., delivered the judgment of the Court.

We may assume that what the Legislature intended by the introduction of the words "in case a *nulla bona* has been returned against him," in the 124th section, words not found in the corresponding section (121) of the repealed Municipal Act, was that in case a writ of *fi. fa.* against the goods of a member of council be placed in the hands of a Sheriff for the purpose of being executed, and that it is duly returned by the Sheriff with a return of *nulla bona*, his seat in the council shall thereby become vacant.

The defendant having been duly elected, and the object of this application being to deprive him of his seat, and to declare it vacant, the forfeiture of the defendant's seat in the council should be strictly made out. The object of the rule *nisi* is to afford to the defendant an opportunity of discovering to the

Court the insufficiency of the charge, or any legal reason why the information should not be granted, and the rule and the materials on which it was issued should show clearly the grounds and the facts, so that the defendant may have an opportunity of admitting or disputing them, more particularly when the matters relied on to support the application may exist without the knowledge of the defendant.

It is not alleged in the relator's affidavit, or otherwise shewn, that the writ was placed in the Sheriff's hands for execution, although so stated in the rule, nor does it appear, nor is it shewn how, to whom, or in what manner the *fi. fa.* was returned. Strictly speaking, the duty of the Sheriff is to return the writ to the proper officer of the Court from whence it issued immediately after execution. As the *fi. fa.* in question was not executed, it never became properly returnable, and if returned as alleged, we may assume that, for the purpose of ascertaining what the Sheriff had done under the writ, he had either been ruled to return the *fi. fa.*, or returned it upon a written demand. If ruled to return it, he is required by the 275th section of the Common Law Procedure Act to return it to the Court, and by the 34th section of 27 & 28 Vic., ch. 28, the Sheriff, when required by demand in writing, shall return a writ within eight days to the party, or the attorney or agent of the attorney, or to the Court, and in case of refusal or neglect he shall then be liable to be ruled to return it.

The writ has either been returned (in the words of the 124th section) against the defendant *nulla bona*, or it has not; if so returned, the fact should be shewn or proved in the usual way—if returned to the party or the attorney, by producing the writ itself with the return, or at least examined copies; if to the Court, by an exemplification. Without one or other of these modes of proof, we do not think, on an application of this nature, that a sufficient case has been made out for our interference, and upon this ground alone the rule should be discharged.

If we were to grant the rule, and the information came on for trial, it would be incumbent on the relator to prove

the writ and return in the usual way, and we see no good reason why, on the application for the information, he should not satisfy the Court that if granted he was in a position to do so.

In *Wilton v. Chambers* (5 N. & M. 431), on motion for an attachment for an insufficient return against a Sheriff, the Court refused to take notice of the return referred to by affidavit, no office copy of the return properly verified being produced. It was argued there that the Court must take judicial cognizance of a document already filed, and of which the law presumed them to be in possession. But the Court said, "The rule must be discharged; and, as it seeks to bring the Sheriff into contempt, we think it should be discharged with costs. Parties who make such motions must, at their peril, come with proper materials."

Rule discharged, with costs.

IN RE McCUMBER AND DOYLE.

Summary conviction—Appeal.

Under Consol. Stat. U. C., ch. 114, an appeal from a conviction must be heard at the Court of Quarter Sessions appealed to. There is no power of adjournment.

Where therefore such Court, after proof of entry and notice of the appeal, adjourned the further hearing, by order, until the next sittings, and then made an order quashing the conviction, the orders were quashed. No costs were given, as no objection had been made at the time of adjournment.

DURING last Hilary Term *Boyd* obtained a rule *nisi*, calling upon the defendant, and the Chairman and Justices of the Court of Quarter Sessions for the County of Norfolk, to shew cause why the order of the Quarter Sessions, quashing an order and conviction of one Harvey, a Justice of the Peace, made at the sittings of the said Court, held on the 11th of September last, and the order made at the previous sessions, to adjourn the hearing of the appeal from said conviction and order to said sittings on the 11th of December,

should not be quashed. One of the grounds of objection taken was, that the defendant Doyle having made his appeal in due form to the Quarter Sessions, which were held on the 11th of September last, the said appeal should then have been heard and determined: that there was no jurisdiction to adjourn the hearing of said appeal, and to adjudicate thereupon and award costs at a subsequent session of said Court. The rule was drawn up on reading the writ of *certiorari* and the return thereto, and the affidavits used in Chambers in obtaining the order for the *certiorari*.—See 4 P. R. 32.

It appeared that the defendant had been convicted under the Master and Servant Act, ch. 75, Consol. Stat. U. C., before a Justice of the Peace, in August, 1866, and was ordered to pay a certain sum of money and costs: that he appealed against the conviction, and entered into recognizances to prosecute the appeal at the then next Quarter Sessions for the County of Norfolk, to be holden on the 11th of September last: that on that day the appeal came on to be heard, and after receiving satisfactory evidence of the due entering and notice of the appeal, the further hearing of the matter was by order of the Court continued until the next sittings thereof, in order that the Court might have before them a statute then recently passed respecting appeals: that afterwards, at the next Court of General Quarter Sessions, held on the 11th of December last, the matter of the appeal again came up for hearing and decision, and the Court having overruled several technical objections urged by the defendant—among others, that the Court had no power to adjourn the appeal from the preceding Court, and no authority to proceed in the matter on such adjournment—heard the appeal, and ordered the conviction to be quashed, with £13 9s. costs, to be paid by the respondent.

During this Term *M. C. Cameron*, Q. C., shewed cause, citing *Dickinson*, Q. S., 641; *Rex v. Justices of Westmoreland*, 10 B. & C. 226; *Rex v. Justices of Buckinghamshire*, 6 D. & R. 142; *Rex v. Justices of Leicestershire*, 1 M. &

S. 442; *Rex v. Justices of Wilts*, 13 East 352; *Rex v. Justices of Oxfordshire*, 1 M. & S. 448.

Boyd supported his rule, citing *Regina v. Cambridge Union*, 1 B. & S. 61; S. C., 7 Jur. N. S. 1075; *In re Doyle*, 4 P. R. 32; *Regina v. Belton*, 11 Q. B. 379; *Bowman v. Blyth*, 7 E. & B. 26.

MORRISON, J., delivered the judgment of the Court.

Upon an examination of the first section of ch. 114, Consol. Stat. U. C., the act respecting Appeals in cases of Summary Convictions, and the judgment of the Court in *The Queen v. Belton* (11 Q. B. 379), cited by Mr. Boyd, and which is a strong authority in favor of this application, we are of opinion that the orders of the Quarter Sessions cannot be supported.

The want of jurisdiction appears on their face, the statute, ch. 114, limiting the power of hearing and determining the appeal to the particular Sessions at which the appeal was to be heard, and no authority being given to the Justices to adjourn the hearing of the matter to a subsequent Sessions.

The case relied on by the defendant, *The King v. The Justices of Wilts* (13 East 352), was considered and commented on in the case cited from 11 Q. B., and the Court acquiesced in the general rule of law as laid down by Lord Ellenborough in that case, where he said, "I hold, without any doubt, that the Court who are to try the appeal have an incidental authority to adjourn it, when once properly lodged, if it be necessary for the advancement or convenience of justice; and that the Sessions are to judge of the proper occasion for doing so." The appeal in that case (*Rex v. Wilts*) was under a local act, which provided that the party aggrieved was to appeal to any Quarter Sessions within four months next after the cause of complaint, &c., and the Justices at the said Quarter Sessions were required to hear and determine the matter of such appeal, &c.

The Court, however, in the case of *The Queen v. Belton*, were of opinion that the words of the statute under which the appeal there was given confined the whole proceeding

to the next Court of Quarter Sessions after the cause of complaint. The language of the act in that case is very similar to that used in sec. 1, of ch. 114. In the former the words are, "And such Court shall at such Sessions hear and determine the matter of such appeal, and make such order therein," &c.; in the latter, "And the Court at such Session shall hear and determine the matter of such appeal, and shall make such order therein," &c.; language equally strong and restrictive. We therefore think that, upon the authority of the case in 11 Q. B., the rule must be made absolute; but as no objection appears to have been made when the adjournment of the appeal was ordered, there will be no costs. We refer also to *Bowman v. Blyth* (7 E. & B. 26).

Rule absolute.

JOINT V. THOMPSON.

Malicious Prosecution.—Reasonable and probable cause.

In an action for malicious prosecution of the plaintiff for stealing timber, it appeared that defendant took one B., who had cut timber for him in 1862-3, to look at some timber lying near the plaintiff's barn, which B. told him he was positive was the same that he had cut for defendant. B. found a newly made path from this timber to where he had cut for defendant, and at this latter place he found that most of the timber had been carried off and the remainder knocked about.

Held, that there was reasonable and probable cause: that B's evidence being uncontradicted, and there being no proof of defendant's absence of belief that the timber was his, there was nothing to go to the jury; and that the plaintiff therefore was properly nonsuited.

One of the plaintiff's daughters swore that the timber at the barn had been cut elsewhere by the plaintiff, but there was nothing to shew that the defendant was aware before the plaintiff's trial that she knew any thing of the matter. *Held*, immaterial.

CASE for maliciously, and without reasonable or probable cause, charging the plaintiff before a Justice of the Peace with having feloniously stolen a quantity of cedar timber, causing him to be arrested and held to bail, and indicting him at the Quarter Sessions, for having feloniously stolen

thirty-six blocks of cedar timber, whereupon it was afterwards adjudged that the plaintiff should depart without day—*per quoad*, &c.

Plea.—Not guilty.

The trial took place in March last, at Goderich, before Draper, C. J.

The Justice of the Peace before whom the defendant laid an information against the plaintiff proved the information, and stated that the defendant had been before him a day or two before that about some horses, which defendant said the plaintiff had impounded; the defendant was in a bad temper; the Justice told him to get his horses and pay the costs, and he afterwards came back, saying he had got them and had paid a trifling sum. After this he laid the information and applied for a warrant against the plaintiff; the Justice, however, issued a summons. Both parties attended before him, and after hearing Broadfoot's evidence and defendant's statement he suggested a settlement, telling the defendant there was not sufficient evidence to send the case to the Sessions. The defendant was angry at this. The Justice then issued a warrant because, as he said, he thought he could not dismiss the case, and because of defendant's ill-feeling. Both parties were angry. Plaintiff always denied having taken the timber, but before the Sessions he went to the Justice to settle the matter by paying the costs. The Justice did not remember that the plaintiff had offered to pay for the timber or that he had ever told one Gardner so, but he said that the plaintiff seemed desirous of avoiding the necessity of going eighty miles to the Court. It was proved that the plaintiff was in custody of a constable from six o'clock one evening until five the following evening, when he gave bail. The indictment and the acquittal of the plaintiff were proved, and the Jury gave their verdict without leaving the box.

One of the plaintiff's daughters (Essa) a girl fifteen years old, swore that the cedar timber which the plaintiff was accused of having stolen, was cut about September 1863, on the plaintiff's own lot, about twenty rods back of the house,

and that she helped to haul it (by hand) to the barn in 1863, and it remained there until 1866; that there was only a sled road to the place where it was cut: that she was aware that defendant had cut cedar timber at a place half a mile off, on the other side of the road, for she had seen it; it was all long. Another daughter (Maria) swore she saw this timber for the first time the morning before she came away, and that she thought it was brought there in June, 1866, before harvest: that she was at home at that time, having been sent for to attend a sick brother, and that her sister Essa asked her to help haul it, but she did not. Then Essa was recalled, and said she *thought* plaintiff cut a little timber in 1866, and she asked her sister Maria to help, but that the plaintiff cut some in 1863 on Isaac Dorran's lot by his permission. On cross examination she said that the timber on Dorran's lot was cut in 1866, and she helped to cut it, and that the plaintiff cut some on his own lot in 1863 and 1866; that in 1863 she and a sister two years younger than herself helped to carry the shingle blocks. The Chief Justice reported that the manner of these two witnesses, especially of Essa, impressed him unfavourably, and that he had casually noticed the plaintiff nodding to the latter during her examination.

A nonsuit was moved for, on the ground that a want of reasonable and probable cause was not shewn, but it was not granted. The defendant then called a witness, who swore that in the winter of 1862-3 he cut shingle timber for the defendant; that last summer (1866) the defendant took him to the plaintiff's place to examine some cedar timber; he did so, and he told defendant he was positive it was his. On his way home the witness passed through the plaintiff's clearing, and found a path which led to the place where he had cut the timber for defendant. He found the timber had been knocked about and most of it removed. The path was new—a fresh path. He had been at the plaintiff's place a year or so before his going with defendant, and had passed the same spot where he saw this timber lying in 1866, and there

was no such timber then at that place; it was all old timber, which had been cut some years, that he saw lying there.

Upon this evidence being heard the plaintiff was nonsuited.

Robert A. Harrison obtained a rule *nisi* for a new trial, on the ground that the nonsuit was improper, that the evidence should have been submitted to the jury. He cited, *Broad v. Ham*, 5 Bing. N. C. 722; *Turner v. Ambler*, 10 Q. B. 252; *Haddock v. Heslop*, 12 Q. B. 267; *Huntley v. Simson*, 2 H. & N. 600; *Williams v. Banks*, 1 F. & F. 557; *Payne v. Revons*, 2 F. & F. 367.

Christopher Robinson, Q. C., shewed cause, citing *Davis v. Hardy*, 6 B. & C. 225; *Wyatt v. White*, 5 H. & N. 380; *Douglas v. Corbett*, 6 E. & B. 514, 516; *Riddell v. Brown*, 23 U. C. R. 90, 97.

DRAPER, C. J., delivered the judgment of the Court.

The case of *Panton v. Williams* (2 Q. B. 169) which was decided in the Exchequer Chamber on a bill of exceptions to the ruling of Lord Denman, C. J., has ever since been the leading and binding decision upon the question raised in this case, though it has not always been followed with unreserved acquiescence. In *Turner v. Ambler* (10 Q. B. 261), Lord Denman seems rather to yield to its authority than to adopt its reasoning; and in *Rowland v. Samuel* (11 Q. B. 41, note) that learned Lord said that great difficulty was raised by it, and expressed regret that it had not been carried to the House of Lords. Tindal, C. J., in delivering the judgment of the Court of Error in that case, observes that "in the more simple cases, where the question of reasonable and probable cause depends entirely on the proof of the facts and circumstances which gave rise to and attended the prosecution, no doubt has ever existed, from the time of the earliest authorities, but that such question is purely a question of law to be decided by the Judge." He puts various cases, in which questions relative to the knowledge, the belief, or the conduct of the defendant must be left to the jury to determine as to their existence or non-existence, but finally

declaring that nothing but the truth of the facts given in evidence, or the justice of the inferences to be drawn from such facts, is to be left to the jury; but when they have determined the truth in these matters, whether they establish reasonable and probable cause it is for the Judge to decide.

In *Turner v. Ambler*, Lord Denman says, that among the facts to be ascertained is *the knowledge of the defendant of the existence* of those which constitute reasonable and probable cause, and *his belief* that the facts amounted to the offence charged. When reasonable and probable cause is established, there is a *necessity for proof of the absence of defendant's belief*. This certainly cannot be proof which the defendant is called upon to give.

In *Douglas v. Corbett* (6 E. & B. 514), Coleridge, J., says, that the theory in *Panton v. Williams*, "is perfect," the difficulty is in the application. From the general tenor of his judgment, I gather that he thought it not requisite to submit to the jury "facts not really in controversy." One of such facts in that case was the belief of the defendant that the particular sheep alleged to have been stolen, was one that he had lost. The Judge assumed this belief, but asked the jury, upon the facts, to say whether there was reasonable ground for this belief as to the identity of the property. He left no other question, but ruled, if they found there was, that, coupled with the other *undisputed circumstances*, there was reasonable and probable cause. Crompton, J., in the same case, observes the duty of the Judge was to decide whether there was reasonable and probable cause "taking into account all the undisputed facts, and leaving the disputed material facts to the jury."

Other cases shew that this is the usual course. In *Heath v. Heape* (1 H. & N. 478), Alderson, B., left nothing to the jury to decide as to reasonable and probable cause, but ruled that there was none. He left the question of malice to them, and reserved leave to move to enter a non-suit, on a question as to what legally constituted the offence with which the plaintiff was charged. The jury found for the plaintiff,

but the right of the Judge to dispose of the question of want of reasonable or probable cause, without leaving any question whatever to the jury, was not disputed.

In *Wyatt v. White* (5 H. & N. 371), no question was left to the jury. There was evidence of facts, uncontradicted evidence, and upon this the Judge decided that there was no evidence of the absence of reasonable or probable cause.

In *Hailes v. Marks* (7 H. & N. 62), Pollock, C. B., observes: "If a man found his own property in the possession of an other, it would be absurd to ask the jury whether he *bonâ fide* believed it to be his property, and acted on that belief, when he gave the other into custody."

In *Riddell v. Brown* (24 U. C. R. 97), this Court reviewed several of the authorities on this question, and in giving judgment it was said, "The facts sworn to shewing probable cause were wholly uncontradicted, and the witnesses who detailed them were not impeached, and the facts were of that distinct character, that there was no question as to the correct inference to be drawn from them. As to the defendant's belief of them, it would be very material on the question of malice, but if their undenied existence shewed probable cause, that cause remained, however malicious the defendant might have been." The contention of the plaintiff's counsel in that case was the same as in the present, but the learned Judge who tried it refused to submit the question to the jury, and the Court upheld his ruling.

See also *Heslop v. Chapman* (18 Jur. 348).

In the present case the facts upon which I ruled that there was reasonable and probable cause were uncontradicted, and the single witness (Broadhead) who proved them was not impeached in any way. It was proved the defendant owned cedar timber, which Broadhead had cut for him in 1862-3: that defendant had seen timber resembling his own, in company with Broadhead, who went at his request to look at it, and who told him he was positive it was the timber he had cut: that Broadhead found a newly-made path between the place where this timber was then lying on the plaintiff's

premises, near the plaintiff's barn, and the place where Broadhead had cut timber for the defendant, and this timber had been mostly carried off, and the remainder was "knocked about"—scattered, as I understand.

Admitting that the evidence of the plaintiff's daughter Essa contradicted Broadhead's assertion that the timber at the barn was that which he had cut, and granting that her whole statement was true, it was neither shewn nor even suggested that the defendant had any opportunity of knowing what she would say, or that she knew anything of the matter, until the trial of the indictment, and he therefore was not chargeable with having acted in wilful disregard of it. In such a case, if in any, the proof suggested by Lord Denman in *Turner v. Ambler*, of an absence of belief on defendant's part that the timber in question was his property, was called for. If it had been given, there might have been a question proper for a jury, though I must confess that I am not clear that even such evidence is not more relevant to the question of malice than to that of the absence of reasonable and probable cause.

To satisfy a jury that the plaintiff should not have been convicted of stealing this timber, is one thing; to establish that there was absence of reasonable and probable cause for accusing him, is another; and it may be comparatively easy so to blend the two questions as to render it difficult for a jury to discriminate between them. There is a better chance of success for a plaintiff if the jury are, as sometimes they must be, left to determine the existence of facts or of inferences of facts, upon the combination of which the Judge tells them the question of reasonable or probable cause depends and hence the anxiety frequently exhibited to get the Judge to rule hypothetically on the conclusions of fact at which the jury may arrive.

In the present case, however, for the reasons given, we think the non-suit right, and that the rule should be discharged.

Rule discharged.

ANDERSON V. STIVER.

Trespass—Right to maintain.

Plaintiff and defendant were working together boring an oil well. Plaintiff was at the bottom, and defendant's brother had been at the top directing the ram used to drive down the pipe. He asked defendant to attend to it while he went away for a short time, and defendant not knowing that the plaintiff was below, let down the ram and injured the plaintiff's hand.

Held, that trespass would lie, defendant's intention being immaterial; and a non-suit was set aside.

TRESPASS, charging that the defendant assaulted the plaintiff, and with the ram of a machine for boring an oil well struck the plaintiff on his hand, and severed his thumb, whereby, &c., alleging special damage.

Pleas. 1. Not guilty. 2nd. That the trespasses were caused by the negligence and improper conduct of the plaintiff.

The trial took place in May last, at Toronto, before Hagarty, J.

The defendant was called as a witness for the plaintiff, and from his statement it appeared that the plaintiff and the defendant's brother were working together boring an oil well. The boring was from the bottom of an old well twenty-eight feet deep. A beech log, nine or ten feet long, was used as a hammer to drive the pipe which was used in boring. There was a frame derrick, fifty feet high, and a steam engine to work the machinery. A rope was attached to the hammer. The plaintiff was at the bottom of the well to attend to keeping the pipe straight. The engine was in motion, and the defendant was requested by his brother to take hold of the rope while he went away for a short time. The defendant did so, and held it during his brother's absence. He drew the rope and let it down again; several down strokes were made while he held it. He took it (the hammer) as high as it could be taken without swinging out of balance, perhaps fifteen or twenty feet, and then let it go again; if it had not been let go, it would have swung out. Defendant swore he did not know the plaintiff was in the

well until he heard him call, haul up. This was a signal to stop. Then the plaintiff was brought up, and said he was in the act of fixing the cap on the pipe when the hammer came down and hurt his thumb. Plaintiff told him afterwards he was thankful it was no worse, and nobody was to blame.

It was proved by another witness that the plaintiff had lost the upper part of his thumb, to the first joint.

It was admitted that the transaction was as the defendant stated, and the learned Judge ruled that trespass could not be maintained. In deference to this ruling, the plaintiff's counsel submitted to a non-suit, not agreeing with the decision. The learned Judge added that the defendant was not a volunteer or wrong-doer, but was asked to act for a few minutes, the machinery being in motion, by the man in charge.

M. C. Cameron, Q. C., obtained a rule calling upon the defendant to shew cause why there should not be a new trial, on the ground that the nonsuit was directed for the reason that the action was trespass instead of case, and that an action for assault would not lie when the assault complained of was merely a negligent act of the defendant, a fellow workman engaged in a common employment.

Robert A. Harrison shewed cause. *Ogle v. Barnes*, 8 T. R. 188; *Williams v. Holland*, 10 Bing. 113; *Moreton v. Hardern*, 4 B. & C. 224; *Rogers v. Imbleton*, 2 B. & P. 117; *Morley v. Gaisford*, 2 H. Bl. 442; *Weaver v. Ward*, Hob. 134; *Sharrod v. London and North Western Railway Company*, 4 Ex. 580; *Gibbons v. Pepper*, 1 Ld. Raym. 38; *Underwood v. Hewson*, 1 Str. 596; *Day v. Edwards*, 5 T. R. 648; *Savignac v. Roome*, 6 T. R. 125; *Leame v. Bray*, 3 East 599; *McLaughlin v. Pryor*, 4 M. & G. 48; *Wakeman v. Robinson*, 1 Bing. 213; *Knapp v. Salisbury*, 2 Camp. 500; *Hall v. Fearnley*, 3 Q. B. 919; B. & L. Prec. 636; were referred to on the argument.

DRAPER, C. J., delivered the judgment of the Court.

From the statement of the plaintiff's counsel it would seem that he submitted to the ruling and accepted a non-suit,

as he understood that the decision of the learned Judge was that the facts proved would not sustain an action of trespass ; and the defendant's counsel has in fact argued in support of the technical proposition, though arguing also that the plaintiff must fail upon the merits.

The learned Judge, however, acted under the impression and belief that the plaintiff had no other evidence except that of the defendant, and being of opinion that his testimony, taken altogether, negatived the plaintiff's right to recover, he directed a non-suit.

The plaintiff's counsel also states that he did not mean to rest his case on the defendant's evidence alone, though he found it necessary to call him, and that he had other testimony to adduce.

I have no doubt whatever, on the abstract proposition, that trespass would lie. It is enough to quote the language of two cases: *McLaughlin v. Pryor* (4 M. & Gr. 48), and *Sharrod v. The London and North Western Railway Co.* (4 Ex. 580). In the former, Tindal, C. J., says: "The enquiry is, not whether the act was wilful, but whether it was wrongful, and an immediate injury resulted from it; any inquiry into the intention of the party is quite unnecessary." And in the latter Parke, B., observes: "The law is well established, that whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass."

Whether the defence can be maintained upon the pleadings, taken in connection with the evidence given, or whether, on a full hearing of the facts, a jury may consider there is a trespass proved for which the plaintiff should recover, is not now in question.

We are of opinion that the rule for a new trial should be made absolute, but notwithstanding the misapprehension that seems to have existed, we think it must be without costs.

Rule absolute.

THE QUEEN V. FAULKNER.

Sale of Liquors—License—29 & 30 Vic., Secs. 249, 254.

Under the Municipal Institutions Act of 1866, secs. 249, 254, a person holding a shop license for the sale of liquors is punishable, under sec. 254, for selling liquor at his shop in quantities less than a quart.

Robert A. Harrison obtained a rule *nisi*, calling upon *Alexander McNabb, Esq.*, Police Magistrate of the City of Toronto, and *George Albert Mason*, the Informant, to shew cause why the conviction by the Police Magistrate of the defendant *Faulkner*, a shopkeeper licensed to sell spirituous liquors at his shop in the said city, for having sold at his shop whiskey in less quantities than a quart, namely, in the quantity of a pint, should not be quashed for irregularity, on the following grounds: 1st. That the defendant was not by law restricted to sales of spirituous liquors in quantities less than a quart. 2nd. That if so restricted, he was not liable to summary conviction for any such sales. 3rd. That so long as in fact licensed, he could not, in the absence of express statutory provision or by-law of the Police Commissioners, be summarily convicted of selling spirituous liquors without license, in excess of or contrary to the license. 4th. That there is no such statutory provision, and no such by-law. 5th. That the latter part of sec. 254 of the new municipal act applies only to the case of persons making sales of spirituous liquors without license, and sec. 255 of the same act, which applies to shopkeepers, creates no offence such as that charged against the defendant.

The rule was drawn up on reading the *certiorari* and the return thereto, the conviction, and the papers annexed. The conviction was as follows:

PROVINCE OF CANADA,)	} Be it remembered that on the
CITY OF TORONTO,)	
<i>To-wit:</i>)	

twenty-second day of May, in the
year of our Lord one thousand eight
hundred and sixty-seven, at the said City of Toronto, M.
B. Faulkner, of the said city, shopkeeper, is convicted before
me, *Alexander McNabb, Esquire*, Police Magistrate for the

the said City of Toronto, for that he, the said M. B. Faulkner, on the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, at the said City of Toronto, while holding a shop license for the retail of spirituous liquors duly granted to him on the ninth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, and which is in the words and figures following, namely:

Class 3rd. Amount \$40.

No. 38.

SHOP LICENSE.

This is to certify that a License was this day granted to M. B. Faulkner, of No. 342 Yonge Street, in the Ward of St. John, in the City of Toronto, Shopkeeper, authorizing him, the said M. B. Faulkner, to sell, by retail, spirituous, fermented, or other manufactured liquors, in his shop at No. 342 Yonge Street, as aforesaid; but not to allow any such liquors to be consumed within his shop, or within the building or premises of which such shop is part, either by the purchaser thereof or by any other person not usually resident within such building. Provided, nevertheless, that the said M. B. Faulkner shall observe and keep all such laws, by-laws, rules, and regulations as are now or may hereafter be lawfully in force in the City of Toronto, in reference to shop licenses, and to shopkeepers, and in respect to the keeping or selling of any such liquors as aforesaid.

As witness my hand and seal, at Toronto, this 9th day of April, A.D. 1867.

OGLE R. GOWAN,

Inspector of Licenses.

Did sell at his shop in the City of Toronto spirituous liquors, to wit, whiskey, in less quantities than a quart, namely, in the quantity of a pint, without the license therefor by law required.

And I do further find that no by-law has ever been passed relative to shop or tavern licenses or otherwise by the Commissioners of Police of the City of Toronto, under section one hundred and forty-nine (149) of the Statute twenty-nine and thirty (29 & 30) Victoria, chapter fifty-one (51).

And I adjudge the said M. B. Faulkner, for his said offence, to forfeit and pay the sum of twenty dollars, to be paid and applied according to law, and also to pay to the said George Albert Mason the sum of two dollars and eighty-five cents for his costs in this behalf; and if the said several

sums be not paid forthwith, I order that the same be levied by distress and sale of the goods and chattels of the said M. B. Faulkner, and in default of sufficient distress, I adjudge the said M. B. Faulkner to be imprisoned in the common gaol of the said City of Toronto for the space of thirty days, unless the said several sums, and all costs and charges of the said distress, and of the commitment and conveying of the said M. B. Faulkner to the said gaol, shall be sooner paid.

Given under my hand and seal the day and year first above mentioned, at the City of Toronto aforesaid.

(Signed,) A. McNABB,
P. M. [L.S.]

McMichael shewed cause, and *Harrison* supported his rule, citing *Regina v. Lennox*, 26 U. C. R. 141. The clauses of the Statute bearing on the question are cited in the judgment.

MORRISON, J., delivered the judgment of the court.

The Municipal Act of 1866 has altered the provisions of the law with respect to shop licenses, and with regard to penalties for selling intoxicating liquors without license. By the 249th section, a shop license is defined to be a license for the retail of liquors in quantities not less than one quart, while the latter part of the 254th section enacts, "but no person shall sell or barter intoxicating liquor of any kind, without the license therefor by law required, under a penalty of not less than \$20," &c. Neither of these provisions is to be found in the repealed municipal act.

It appears on the face of the conviction that the defendant received a shop license for the current year, and it further appears that he did sell at his shop spirituous liquors in less quantities than a quart, without the license therefor by law required.

It was contended, however, that notwithstanding the limitation in the 249th section, as to shopkeepers selling in quantities not less than a quart, that there were no express words in the statute making it an offence for a person holding a shop license to sell less than a quart, or for inflicting a

penalty in the event of a shopkeeper doing so ; and it was further contended that the defendant did not exceed the authority granted him by the license itself, as it did not restrict him to selling in any quantity.

As to the latter point, the license contains a proviso that the defendant should observe and keep all such laws, by-laws &c., as were then or might thereafter be lawfully in force in the city, in reference to shop licenses, and to shopkeepers, and in respect to the keeping or selling of any such liquors. By the statute it is provided that a shop license can only be granted to sell liquors in quantities not less than a quart. It can hardly be said that this is not one of the laws which his license provides he should observe and keep. It is not pretended that the defendant had a tavern license, the only license that could authorize him to sell in so small a quantity as a pint, so that in fact he was doing that which neither the law nor his license authorized him to do.

The question we have now to determine, however, is whether selling intoxicating liquors under the circumstances charged against this defendant is an offence, and punishable under the provisions of sec. 254, and we are of opinion that it is. We may assume that the legislature had some object in amending the law and restricting a licensed shopkeeper to selling in quantities of a quart and upwards, with a view to revenue or to remedy some defect in the previous law. We take it that when a statute, as in the present instance, defines what a shop license is, and the authority it gives, if it would be an offence or infraction of law for a shopkeeper to sell without any license whatever, it would be no less an offence for him, having such a license, to sell contrary to it, and beyond the authorized limit ; or, to put it in another light, if the legislature by the municipal act had so amended the law as to declare that no shop license should be granted, and that it would be lawful for shopkeepers to sell intoxicating liquors in quantities of a quart and upwards, it would hardly be contended that the selling in less quantities without a license would not be an offence punishable under the provisions of the 254th section. As well might it be argued

that because under sec. 252 no tavern or shop license shall be necessary for selling any liquors in the original packages, provided they contain not less than five gallons or one dozen bottles, that it would not be an offence to sell packages containing one gallon or half-a-dozen bottles.

We are, therefore, of opinion that the defendant was properly convicted, and that the rule be discharged with costs.

Rule discharged.

LEONARD V. THE AMERICAN EXPRESS COMPANY.

Common carriers—Evidence—Liability.

In an action against defendants as common carriers, the plaintiff proved a receipt signed by them contracting to carry on certain conditions, and that they had carried fish for one witness called, as well as for the plaintiff, on an arrangement made by their agent in their office for a month. This witness also said the other fishermen in Goderich had arrangements with defendants for the carriage of fish. *Held*, some evidence that defendants were common carriers; and that, if so, they were liable to an action at common law for refusing to carry except upon conditions limiting their common law liability.

Held, also, that to support such action it must be shewn that the plaintiff tendered the goods to be carried, as well as the fare.

Held, also, that the contract to be inferred from the evidence, stated below, was a limited not a general one as declared upon.

THE declaration contained six counts. 1st. Against defendants as common carriers from Goderich to Buffalo, for refusing to receive and carry the plaintiff's goods on tender of their reasonable hire. 2nd. On a special agreement to carry for the plaintiff from Goderich to Buffalo, fresh fish in boxes, at \$1.65 per one hundred pounds weight; breach, that they refused to receive and carry according to the agreement. 3rd. Similar to the first, but charging defendants as common carriers from Goderich to London. 4th. Similar to the second, on an agreement to carry from Goderich to London at \$1.00 per one hundred pounds weight. 5th. Similar to the first, charging defendants as common carriers from Goderich to Hamilton. 6th. On

special agreement to carry from Goderich to Hamilton, at \$1.10 per one hundred pounds.

Pleas—1. To first, third, and fifth counts, that the defendants were not common carriers. 2. To the same counts, that the plaintiff did not tender to them at their usual place of business, at Goderich, the said goods to be carried by defendants as common carriers. 3. To the same counts, denial that the plaintiff offered to pay, &c. 4. To second, fourth, and sixth counts, that the defendants did not agree, &c. 5. To the last named counts, that the sums respectively mentioned in those counts were a less charge than the ordinary value of carriage from Goderich to the respective places mentioned ; that defendants agreed to carry at those rates on the distinct understanding, and as part of the agreement, that they should not be liable to the plaintiff for any fish lost or mislaid during the carriage ; that the defendants were ready and willing, during the times respectively mentioned, to carry the plaintiff's fish at the said rate on such conditions, or at their ordinary rates and make good any loss that might occur during the carriage ; but the plaintiff insisted upon the defendants carrying at the reduced rate subject to liability for loss, contrary to the terms of their agreement, of which the plaintiff had notice ; and the tenders respectively mentioned were at the reduced rates, and upon the terms that defendants should be liable for loss.

The case was tried at Goderich, in October, 1866, before Hagarty, J.

The plaintiff gave evidence of a parol agreement made about the 16th of May, 1866, with him, by a Dr. Arnott, who, according to the testimony of one witness, had made similar parol agreements on behalf of the defendants with himself and other fishermen, to the effect that the defendants should carry fresh fish for the plaintiff at the rates as mentioned in the declaration. The ordinary season for the fish is from the beginning of May to about the middle of September. This witness said they carried fish for him, but that some time in May or June he had signed a written agreement ; he knew that the plaintiff objected to the terms of this writing. The

difference between the witness's first and second contract was as to the risk of loss. Mr. Kay made him sign the written agreement. It was Kay who took the weight of the fish, &c., in shipping them. He had an office with "American Express Company" over the door. It was in that office Arnott made the bargain with the plaintiff; the weight of the boxes and ice in which the fish were packed was included. Nothing was said about the duration of the bargain; this witness supposed his own would last throughout the season. The defendants carried things from Goderich by the railway.

On the 15th June the plaintiff tendered money to Kay at the office spoken of to pay for the carriage of fish. Kay refused to take the money or the plaintiff's fish unless the plaintiff would sign some document. The next day the witness who proved this tender saw at the plaintiff's two boxes weighing 200lbs. each, and two others weighing 150lbs. each; but he did not know what became of them, nor that the plaintiff spoke to Kay when he wanted the fish to go. Another day the witness went with the plaintiff to Kay, and the plaintiff tendered both American and Canadian money to Kay for the freight of fish to be carried. This witness could not tell to what place Kay refused to take it. Plaintiff was largely engaged in the fish business. At the time of the second tender the witness saw no fish. He saw fish on the day after the first tender. This witness sent fish by the defendants all that season.

A receipt put in was admitted as showing the form of receipt usually given by defendants for articles put into their hands to be carried and delivered. On the face of it were stated several conditions, subject to which "this company" undertook to forward the articles received. It was headed "American Express Company."

Some slight evidence of loss to the plaintiff by the refusal to carry fish for him was given. The learned Judge refused to receive evidence of loss of profit except upon parcels actually tendered and which the defendants refused to carry. It was proved that there was about one-fourth profit on fish got out. In June white fish were worth \$2.50 per 100lbs. undressed, and \$3 dressed.

For the defendants it was objected that as to the first, third, and fifth counts no tender was proved of any specific fish or sum of money, and that it was not proved that the defendants were common carriers: that as the second, fourth, and sixth counts, there was no proof of their alleged contract, and no proof that the defendants were a corporation; if they were a corporation, then the alleged contract was executory and required to be made under the corporate seal. It was agreed that the defendants might move to enter a nonsuit on these objections, or to enter a verdict for them on the first, third, and fifth counts; the verdict to be entered for the plaintiff for \$14, and the plaintiff to have leave to move for a new trial for misdirection as to damages, &c. If the Court should be of opinion that only nominal damages should be granted, then the verdict to be reduced to one shilling.

In Michaelmas term *Moss* obtained a rule calling upon the plaintiff to show cause why a nonsuit should not be entered, pursuant to leave reserved, or to enter a verdict for the defendants on the issues raised on the first, third, and fifth counts, or to reduce the verdict for plaintiff to one shilling.

In this term *Robert A. Harrison* showed cause, citing *Davis v. North Western Railway Co.*, 4 Jur. N. S. 1303; *Oxlade v. North Eastern R. W. Co.*, 3 L. T. Rep. N. S. 671.

DRAPER, C. J. delivered the judgment of the Court.

There was, in our opinion, some evidence that the defendants were common carriers. Even the receipt signed by Kay, and dated at Goderich, shows that they held themselves out generally as carriers of goods to specified places, though limiting their common law liability to the printed conditions. And they carried fish for one witness at least, as well as for the plaintiff, on an arrangement as to price made by Dr. Arnott in their office at Goderich, for a month or so, in the beginning of the season of 1866; and this witness spoke of the fishermen generally as having arrangements with the defendants to forward fish. But on the 15th of June there was a change, the cause of which does not appear in the evidence.

The defendants insisted on limiting their liability in some way, but to what extent is not stated; but the plaintiff refused to sign some agreement or conditions, and insisted they should carry his fish on the same terms as theretofore—that is, we presume, either on the conditions appearing on the receipt put in or subject to their common law liability, which they refused to do. We think this was some evidence to bring the case within *Johnson v. the Midland Railway Company* (4 Ex. 367). If common carriers, they were liable to an action at common law for refusing to carry on any terms except those of unlimited liability. There is much force in the remark of a modern writer, as to the growth of special contracts on the part of common carriers, and the allowance of a “system of limited liability to spring up, which has almost inextricably confounded the duties and rights of different classes of carriers, and practically converted his” (the carrier’s) “relation to the public unto a species of despotic monopoly, in which the carrier dictates, and the employer acquiesces in, the special terms on which alone the former will consent to act for the latter,” (Powell on Carriers, 36). No decision nor statute has yet inhibited the right to sue the carrier for refusing to accept and carry such articles as he publicly professes to carry, subject to all the liabilities which attach at common law.

But it appears to us that the plaintiff fails in the proof which it was necessary for him to have given on the issues on the second and third pleas to the first, third, and fifth counts. He proved a general refusal to carry unless he would accede to some conditions and make a special contract limiting the defendants’ liability. Now, in *Carr v. The Lancashire Railway Company, &c.* (7 Ex. 709) Parke B. says, “If the plaintiff had sought to enforce the defendants’ obligation as common carriers, he ought to have tendered a reasonable compensation for the carriage of the chattel; and upon their refusing to receive it he might have sued them upon their common law liability.” But in this case the reasonable compensation would depend on the weight of the article, and the place where it was to be delivered. Till these were ascer-

tained there was no element of calculation, and therefore the tender of the article to be carried, as well as of the compensation, became indispensable. We do not suppose it will be contended that an action could be maintained on evidence that the plaintiff went to the defendants and said, "I have four boxes of fish which I want you to carry. I have here with me money to pay for the carriage, and am ready to pay you a reasonable compensation," without having the fish ready at the place where defendants received and weighed articles they were to carry—without stating to what place they were to be carried, and without tendering some sum, or at least some rate, according to weight and distance. It appears to us he failed in this part of his proof of a necessary averment which was traversed. This issue did not present the question of waiver, on which the plaintiff's counsel relied on the argument. I refer to *Jackson v. Rogers* (2 Show. 327), where the plaintiff brought his pack and tendered the hire, and *Munster v. S. E. Railway*, (4 C. B. N. S. 676; 27 L. J. 308, C. P.)

As to the second, fourth, and sixth counts, we think, also, there was a failure of evidence. Waiving the question of Dr. Arnott's authority, which is for a jury, if indeed there was evidence enough to be left to them, the receipt put in by the plaintiff in order to show that defendants were common carriers proves also that they professed to carry upon certain conditions; and the right to contract by a qualified acceptance, or, more strictly speaking, that a qualification by mutual agreement of the employer and the carrier is binding upon the former, is recognized from a very early period. See Southcote's case (4 Rep. 84, note); *Morse v. Slue* (1 Vent. 238). If the contract with Dr. Arnott was binding as to price, it was silent (so far as direct evidence goes) as to duration. A jury might possibly have found that it was for the whole season. We should rather infer that whatever he agreed to, assuming he had authority, settled the price only, and was meant to be subject to the conditions contained in the receipt. This inference, we think, is the obvious result of the plaintiff combining, as his

evidence, this receipt with the bargain with Dr. Arnott, and then the general contract stated in the counts is not proved, but instead thereof a limited contract.

For these reasons we think the rule to enter a nonsuit should be made absolute.

Rule absolute.

MORGAN V. QUESNEL.

Sale for taxes—Warrant not sealed.

Land having been sold for taxes under a warrant issued without a seal.
Held, that the sale was invalid, and the defect not cured by 29 Vic., ch. 26.

EJECTMENT for lot 18, in the 10th concession of the township of Finch. Defence for the west half of the east half of the same lot.

The defendant claimed title by deed from Joseph Godard, who held by deed from Daniel Eugene McIntyre, Sheriff of the United Counties of Stormont, Dundas and Glengarry.

At the trial in October, 1866, at Cornwall, before Draper, C. J., the plaintiff gave in evidence a chain of title traced from the Crown patent, dated 2nd April, 1807. The patent issued in 1807 for No. 18, and the west part of No. 19, containing together 200 acres. In the Treasurer's office-book of return of lands described No. 18 and the west part of No. 19 were entered as together containing 200 acres, and payments for several years made. There was a return by the Sheriff of a sale for taxes of these 200 acres, in January, 1840. The account for taxes was kept on the two lots in one sum, as together forming one taxable parcel, until 1850.

The defendant's title was under a sale for taxes.

It was proved that this lot was returned for arrears of taxes from 1845 to 1850, and for the taxes of 1851. This return was made by the County Treasurer from the Assessor's rolls, and from the Collector's return of 1851, which was put in, charging this lot with £3 5s. 3½d.

The Treasurer produced his warrant, dated 11th August, 1852, stated on the face of it to be given under his hand and seal, addressed to the Sheriff of the United Counties of Stormont, Dundas, and Glengarry, for the sale of lands in the Township of Finch, respectively charged with taxes, &c. In this warrant, No. 18, 10th concession, containing 200 acres, was included, and it was charged with the sum of £3 5s. 8½d. This warrant was marked by the Sheriff "Received and filed the 11th day of August, 1852."

No question was made as to the proper advertising of this sale.

The Collector's return had annexed to it an affidavit, stating that the sums mentioned in the annexed account for the year 1851 remained unpaid, and that he had not, upon diligent enquiry, been able to discover any goods or chattels belonging to or in possession of the parties therein charged with or liable to pay such sums, whereon he could levy the same. The Jurat was as follows: "Sworn before me at Cornwall, this 17th day of July, 1852. (Signed) R. Macdonald, County Treasurer."

As to this, the Treasurer gave evidence that he did not at the time sign his name to this Jurat; that it was an oversight, and he put his name to it recently, but he was positive the Collector had made the affidavit. With regard to his warrant above noted, he said that when the Sheriff returned it to him with other warrants, about a month before the trial, the Sheriff observed that it had no seal. The Treasurer thinking that as such officer he had a right to supply any omission, put a seal (a wafer) on it, but afterwards doubting if he could properly do this, he took it off again, but the mark of the wafer remained. He could not swear whether there was or was not a seal originally put to the warrant; he saw no mark of a seal when he put one on recently. All the other warrants had a wafer with a piece of paper over it as the seal. He also produced a return up to the 1st January, 1851, of all the taxes due on wild lands. It contained No. 18, 10th concession Finch, six and a half years, the amount £2 12s. 9½d., from 1845 to 1850, inclusively. He had no regular seal of office.

The Sheriff stated, that this warrant had been in his hands; that he discovered, on looking at it some months ago, that there was no seal on it. He had no recollection whether it had or had not a seal; he thought there was some slight indication of a seal, but it was higher up on the paper than the present mark of a seal.

It was admitted that the Sheriff, by deed dated 13th January, 1856, conveyed to George S. Jarvis, Esq., this lot No. 18, 10th concession Finch, as containing 200 acres: that Mr. Jarvis, by deed, dated 19th January, 1866, conveyed the west part of the east half of this lot, containing fifty acres, to Joseph Godard, who, by deed dated 7th March, 1866, conveyed the same to the defendant. All these deeds were registered.

It was also admitted by the plaintiff's counsel that a return (produced) of non-resident lands in the township of Finch, for 1851, came from the Clerk of the township, and that in it No. 18, 10th concession, was set down at 200 acres, value £30. It was proved that in fact the lot contained somewhat less than 200 acres, only 185. This lot No. 18 was not inserted on the Assessor's roll, nor on the Collector's roll, for the year 1851.

Various objections were raised to the tax sale under which the defendant derived title, but it was agreed that it should be left to the jury to say whether the warrant had originally a seal to it; and that as to other evidence it should be left to the Court to draw inferences of fact, and to determine the questions of law arising thereon.

The jury were told, unless the evidence clearly brought them to a contrary conclusion, to presume that there was a seal upon this warrant as there ought to have been, and as there was upon each of eleven other warrants issued on the same day, but that if it was omitted the omission could not be cured by putting a seal afterwards: that the presumption that it was duly sealed was weakened, if not destroyed, by the recent addition of the seal, and that taken in connection with the Treasurer supplying another omission by signing the Jurat to the affidavit, it might be that he thought he might lawfully supply this omission also.

On the agreement above stated, the jury were told to find for the plaintiff, with leave to the defendant to move to enter a verdict for him.

The jury found that the warrant was issued without a seal, and gave a verdict for the plaintiff.

In Michaelmas Term, *S. Richards, Q. C.*, obtained a rule calling on the plaintiff to shew cause why a verdict should not be entered for the defendant, upon the leave reserved, on the ground that the tax sale and the deed under which the defendant claimed title were legal and valid, and that the objections taken thereto were not entitled to prevail; that the said sale and deed were made valid by Stat. 29 Vic. ch. 26; or for a new trial, the verdict being against law and evidence, as the jury should have found the warrant was made under the hand and seal of the Treasurer.

In this term, *Kerr* shewed cause, citing *Dormer v. Thurland*, 2 P. Wms. 506; *Sugden on Powers*, 247; *Chance on Powers*, 329.

S. Richards, Q. C., and *S. M. Jarvis*, supported the rule, citing *Morgan v. Parry*, 17 C. B. 334; 29 Vic., ch. 26.

DRAPER, C. J., delivered the judgment of the Court.

The argument for the defendant was rested upon two points. 1st. As to the seal. 2nd. As to the sale being made effectual under the 29 Vic., ch. 26.

On the first point it was argued that the Statute was only directory as to the seal, though imperative as to a warrant to authorize a sale; that a seal was not in all cases essential to the validity of a warrant, as, for instance, a distress warrant: that the Treasurer was not acting as the officer of a Court of Record, whose seal he was bound to use, and that he had no official seal as Treasurer.

As to the second point, it is sufficient to say that the facts proved in this case do not bring it within the class of cases to which that Statute was intended to afford a remedy, and indeed the leading counsel for the defendant did not attempt to sustain his client's defence upon it.

Mr. Richards, however, referred to *Morgan v. Parry* (17 C. B. 334), in support of his position that the Statute was only directory as to the use of the seal. In that case the question turned upon the 13th section of the English Statute 6 & 7 Vic. ch. 18, which enacted that the overseers of every parish should make out, by a fixed day, an alphabetical list of voters, and that the said overseers should sign the list. The Court held that the signing the lists by the overseers was directory only. In giving judgment, Jervis, C. J., remarks, (p. 349) "The object of the Legislature, in requiring the publication of lists, appears to have been to give to all parties interested an opportunity of making and giving notice of claims and objections; and that object will be attained by the publication of a list, although unsigned. * * The reason for requiring signature to the list to be delivered to the revising barrister, is probably to identify it as the list originally made out by the overseers."

But this reasoning, or the principle involved in it, has no application in the present case. Here the warrant is in the nature of a writ conferring on the Sheriff a power and authority to sell and convey lands, and that warrant, by which alone the power is conferred, is required to be under the Treasurer's hand and seal. If the requirement to put a seal is directory, why not also the requirement to sign, to issue a warrant under his hand. Would it be sufficient if he wrote out the warrant and did not sign it; or may he act, as in old times it appears the Sheriff might act in regard to replevins, which is more closely to the purpose than a distress warrant? "And the Sheriff, upon a complaint made unto him of taking the cattle, may command his bailiff by word to replevy them; and the same is as well as if the Sheriff had made his warrant to his bailiff to have replevied them; for it may be that the Sheriff nor his bailiff cannot write, or that they may want such things wherewith they may write a warrant, &c." Fitzherbert Nat. Brev., 69 E.

Under the 6 Geo. IV., the first Act which authorized the sale of lands for arrears of taxes, the writ to levy was issued by the Clerk of the Peace, who was authorized to

sign and seal it by the Court of General Quarter Sessions, either during or after the sitting of the Court. It could hardly have been contended that this writ need not be sealed, and we see as little reason for so holding in respect of the Treasurer's warrant. We find no sufficient reason for adopting the conclusions contended for, and I retain the opinion I expressed at the trial, that if the warrant was issued unsealed it conferred no power on the Sheriff to sell. The creation of the power was defective, because it was not created in the manner and form which the Statute enjoins.

There was another objection which was not discussed, but which would probably have been fatal. The grant was for 200 acres of land, consisting of No. 18, and part of No. 19. The taxes seem to have been imposed on the 200 acres generally, not distinguishing between the two lots. Although the lot 18 was rather wider on the ground than was intended in the plan of survey, it contained only 185 acres, and the tax was levied for the 200 acres upon No. 18 only.

However, we rest our conclusion on the defect in the warrant. We see no ground whatever for granting a new trial.

Rule discharged.

BARBOUR V. GETTINGS.

Malicious prosecution—Evidence.

In an action for malicious prosecution, want of reasonable and probable cause must be shewn by the plaintiff. Slight evidence may be sufficient, for it is the proof of a negative, but there must be some proof; and in this case, where it was shewn only that the defendant laid the information on which the plaintiff was arrested, and that the magistrates after hearing the parties dismissed the charge. *Held*, that a verdict was properly directed for defendant.

THE declaration contained four counts, 1st. Trespass for taking plaintiff's horses and cattle. 2nd. Trespass for taking plaintiff's wheat and other grain, cattle, and farming implements. 3rd. For distraining for arrears of rent goods of a much greater value than the arrears of the rent and

charges. 4th. For malicious prosecution of plaintiff on a charge of felony.

Pleas—1. Not guilty, to first, second, and third counts, by Statute 11 Geo. II., ch. 19 s. 21. 2. To the first and second counts, that the goods were not the plaintiff's. 3. To the same three counts, leave and license. 4. To the last count, not guilty.

The case was tried in October, 1866, at the Assizes for York and Peel, before John Wilson, J.

It appeared that the plaintiff had taken a lease of a farm from the defendant for five years, from the 14th February, 1863, and that on the 1st of June, 1864, by a written memorandum signed by both of them, he had given up full possession to defendant, who agreed to take it off his hands. Plaintiff, however, continued to reside there with his two sons. He was at the time of this arrangement in arrear for rent, and in debt to other parties. Upon a mutual understanding defendant distrained for arrears, and the horses and cattle mentioned in the first count were seized and sold, defendant being the purchaser, for \$149.75. The defendant then made a lease to the plaintiff's two sons for three years and eight months, the rent to be payable \$150 immediately, \$200 on the 1st of June in each succeeding year, and \$133.34, being for the eight months, on the 1st June, 1867. The defendant also entered into an agreement with the sons, dated 14th June, 1864, reciting that the plaintiff had become indebted to him for \$150 rent, and reciting the distress and sale, and that the sons were desirous of redeeming the horses and cattle; and the defendant agreed to deliver them to the sons, and they covenanted to pay him \$149.75 by the 14th of September then next. In September, 1864, the oats, peas, barley, and wheat, which had been sown while the plaintiff was tenant, (and which one of the sons swore the father, on the making this arrangement, had given to them "in a present,") were seized by a bailiff under a landlord's warrant for the \$150 rent due by the sons. This was the trespass alleged in the second count. One Kennedy bought them, and afterwards transferred them to the defendant.

By an agreement, dated 15th October, 1864, made between the defendant and the two sons, (after reciting, among other things, that the defendant owned this grain) the sons agreed to allow the defendant the use of the granary on the demised premises for the purpose of storing away the grain when threshed, and to keep the same therein until he could carry it away, sell, and dispose of it. Under this the defendant placed the grain there. One of the plaintiff's sons proved that when he went away from home, in January, 1865, the defendant had the granary locked, but that when he was at home, in February, it was not locked, though the defendant in March still had the key; and this witness further said that the plaintiff got five bags of grain, and that he himself got one bag from the defendant to pay a creditor with.

The justice who issued the warrant stated that the defendant told him all the circumstances, on hearing which he drew the information: that the defendant appeared to be acting in good faith, and that he (the J. P.) granted a warrant, on which the plaintiff was brought before him and another justice, and they dismissed the case after hearing both parties.

The learned Judge left the case to the jury on the first three counts, and directed them to find for the defendant on the fourth, stating that he was of opinion there was no evidence of a want of reasonable and probable cause. They found for the defendant.

In Michaelmas term *M. C. Cameron, Q. C.*, obtained a rule calling on the defendant to shew cause why there should not be a new trial on the law and evidence, and on the ground of misdirection and the rejection of evidence, which misdirection was in withdrawing the fourth count of the declaration, and ruling that there was no evidence for the consideration of the jury on that count; and also in telling the jury that thirty bushels of the wheat which had been set apart for the plaintiff by the bailiff was not the plaintiff's property, and in rejecting evidence of the quantity of grain and other articles seized and the value thereof.

Robert A. Harrison shewed cause in this term, citing *Incedon v. Berry*, 1 Camp. 203, note; *Wallis v. Alpine*, 1 Camp. 204 note; *Byne v. Moore*, 5 Taunt. 187; *Nicholson v. Coghill*, 4 B. & C. 23; *Savil v. Roberts*, 1 Salk. 15; *McCreary v. Bettis*, 14 C. P. 95; *Dawson v. Vansandau*, 11 W. R. 516

M. C. Cameron, Q.C., supported the rule.

DRAPER, C. J., delivered the judgment of the Court.

It is only upon the ground that the prosecution of the plaintiff was instituted without probable cause that the fourth count could be sustained. The allegation of the want of it is a matter of substance and must be proved, it is not to be implied—*Sutton v. Johnstone* (1 T. R. 544-5). Slight evidence may be sufficient, for it is in truth the proof of a negative—*Cotton v. James* (1 B. & Ad. 133); but, as Lord Ellenborough ruled in *Purcel v. McNamara* (1 Camp. 199) there must be some proof. When the facts are undisputed the Judge disposes of the question as one of law. (See *Joint v. Thompson*, determined in this Court to-day (a). *

Now, in the present case we see no evidence given by the plaintiff which really touches the point. He certainly proved that the defendant laid an information against him for stealing his oats; that he (the plaintiff) was arrested on a warrant upon this charge, and that on hearing it the justices dismissed the case; but all this is consistent with the existence of probable cause, and yet this is all the evidence given to support this count on the examination in chief of the plaintiff's witnesses, as far as we can discover on the learned Judge's notes. Perhaps the evidence taken before the justices who heard the case went further, most probably it must; but the learned Judge rejected that, upon its being tendered by the defendant's counsel.

On the cross-examination of the plaintiff's son, it appeared that the defendant had grain, including oats, in the granary, which had been kept locked, and the key in the defendant's

(a) *Ante* p. 519.

possession; that at a time when he left home the granary was locked, and in the following month he returned and found it unlocked, the key still being in the defendant's keeping, and he further said the plaintiff had got five bags of this grain, without giving or being asked to give any further explanation. The evidence that the defendant owned this grain and was in possession of it was undenied; it was not denied that the plaintiff took the oats, and there was no attempt or offer to prove that it was done by the plaintiff by authority from the defendant.

During the argument it was asserted that the defendant permitted the oats to be used to feed certain horses which the sons had, and that the plaintiff wanted to shew that if he took the oats it was under the license, and with his son's approval. The learned Judge's report contains nothing to shew that any such evidence was tendered and rejected, nor does the evidence suggest it.

Then the Justice stated that the defendant told him all the circumstances, and therefore he drew up the information, and that defendant appeared to be acting in good faith. It is true this latter evidence goes more to rebut malice than to establish the existence of probable cause, but it is not to be overlooked when the only fact to shew the want of it is that the charge was, upon investigation, dismissed by the justices.

In our opinion the learned Judge was right in holding that there was no proof of want of probable cause.

As to the other three counts, we think the plaintiff had not the slightest foundation on which to rest a speculative chance of success. If the evidence which was rejected ought to have been admitted, which we by no means decide, the action on those counts failed wholly on entirely distinct grounds.

We think the rule should be discharged.

Rule discharged.

THOMAS MACBETH V. MARY MACBETH, EXECUTRIX OF
THOMAS MACBETH.*Executor—Sale of Mortgage by.*

An executor holding a mortgage given to the testator, sold and assigned it, taking the purchaser's promissory notes payable to himself or order. *Held*, upon an issue of *plene administravit*, that this in law amounted to a receipt of the original debt, making the executor chargeable with the mortgage as an asset in possession.

COMMON counts against the defendant as executrix.

Pleas—1. That neither the defendant nor Thomas Macbeth were indebted. 2. *Plene administravit*. 3. Statute of Limitations. 4. As to so much of the declaration as claims to recover upon accounts stated, that the said accounts were procured to be stated by the fraud of the plaintiff. Issue.

The trial took place at the Spring Assizes for the County of York, 1867, before Richards, C. J.

The plaintiff gave evidence to establish his claim for work done for the testator, and he also proved a written acknowledgment signed by the testator sufficient to take the claim out of the Statute of Limitations, and the issues upon never indebted and the Statute were found in his favour. This was not moved against. The struggle was on the plea of *plene administravit* and the proper amount of assets.

There was proof that the testator left household goods, fanning mills, tools, &c., and also that he died possessed of a mortgage given to him by his son Andrew to secure payment of the sum of \$1020. This mortgage the defendant sold and assigned for the sum of \$500, for which she took the purchaser's promissory notes, each for \$100, payable to herself or order. One was drawn payable on demand, and had been paid; the other four had not fallen due. There was no evidence given of the administration of any part of the assets.

The learned Chief Justice directed that the sale of the mortgage and the taking notes payable to herself made the mortgage an asset in possession, for which the defendant

as executrix was liable to account in this action ; and that she was chargeable with the fair value of it at the time of selling it, as well as with the value of the other chattel property.

The jury found for the plaintiff \$770.10, and that the mortgage was worth more than the plaintiff's claim ; and that besides this the other assets were sufficient to meet or answer the plaintiff's claim. Leave was reserved to the defendant to move to reduce the verdict as the Court might think right as to the plea of *plene administravit*, and if the effect of that reduction should be to reduce the verdict generally, such reduction was to be made.

Robert A. Harrison obtained a rule calling on the plaintiff to shew cause why the verdict should not be reduced to the sum of \$500, or such other sum as the Court might see fit, or otherwise dealt with as to the Court might seem meet, upon the ground that neither the mortgage from Andrew Macbeth to the testator, nor the promissory notes received on the sale of the same, were at the time of the commencement of this suit assets of the testator in the hands of the defendant to be administered.

McMichael shewed cause, citing *Hosier v. Lord Arundell*, 3 B. & P. 7 ; *Norden v. Levit*, 2 Lev. 189 ; *Wms. on Exrs.* 1825.

Harrison, contra, cited *Brightman v. Keighley*, Cro. Eliz. 43 ; *Jackson v. Bowley*, 1 C. & Marsh. 97 ; *Fisher v. Trueman*, 10 U. C. R. 617.

DRAPER, C. J., delivered the judgment of the Court.

We are of opinion this rule should be discharged. The defendant, as executrix, had in her possession a mortgage for \$1020 : she sold it for \$500, taking promissory notes payable to herself or order for that amount, and thus entirely changed the nature of the debt due to the estate, transferring the security she held as executrix and taking a new and merely personal security payable to herself for about half the original amount.

The old case of *Brightman v. Keighley*, (Cro. El. 43) which was cited for the defendant, leads to a contrary conclusion. There a minor was named executor, and pending his minority administration was committed to A. and B., who collected £600. On coming of full age the executor released them of all accounts, and the Court held the £600 became assets for which he was responsible.

It is well established that though debts of every description due to the testator are assets, yet the executor is not to be charged with them till he has received the money. But such debts will be treated as assets, though never actually received by the executor, as in *Brightman v. Keighley*. So if the executor takes an obligation in his own name for a debt due to the testator, for the new security has extinguished the old right, and as to the executor is in the nature of a payment. The authorities for this position are cases where the new security is taken from the original debtor, but the present case appears to us to be even stronger. The mortgage debt due to the testator was clearly one of the assets of the estate, as much as a horse or a fanning mill. The executrix sold the asset absolutely, and took the promissory note of a new party in lieu of it. So far as the debtor to the estate is concerned, or the security upon real estate, there is an entire release, not of the debt itself, but of any claim of the testator's estate upon him or the mortgage security, for these are substituted promissory notes in which the defendant, the payee, is not named as executrix; they are made payable generally to her or her order. We think that in law this amounts to a receipt of the original debt, and therefore that this rule should be discharged.

See *Norden v. Levit*, 2 Lev. 189; *Hosier v. Lord Arundell*, 3 B. & P. 8; *Partridge v. Court*, 5 Price 419, affirmed in error in 7 Price 591.

Rule discharged.

ELMORE P. ROSS V. THE COMMERCIAL UNION ASSURANCE
COMPANY OF LONDON.

Insurance—Condition—Construction of—Untrue statement as to title.

One of the conditions of a fire policy required that persons insured should within fourteen days give in writing an account of their loss or damage, such account of loss to have reference to the value of the property destroyed or damaged immediately before the fire, and should verify the same by their accounts, and by affidavit, and such vouchers as in the judgment of the Company might tend to prove such account and value, and should produce such further evidence and give such explanations as might be reasonably required; and if there should appear any fraud or false statement in such account of loss or damage, or in any of such accounts, evidence, or explanations, or if such affidavit should contain any untrue statement, the policy should be void. *Held*, that as an affidavit could be required only to verify the account of loss or damage, the "untrue statement" must refer also to such account, and that an untrue statement in the affidavit as to the plaintiff's title, would not avoid the policy.

In this case the statement complained of was, that the plaintiff was absolute owner of the building insured, which was unincumbered, whereas, he had not yet paid for the land. He had, however, put up the building himself, so that if it had not become part of the realty his statement would have been literally true.

THE declaration stated a policy of insurance dated 13th January, 1866, by which, subject to the conditions and stipulations indorsed thereon, the defendants undertook to pay to the plaintiff the amount of all such damage and loss as he should suffer by fire on a house occupied as a country store in the said policy described, not exceeding \$800, during a year from the said 13th January, 1866. The declaration set out the 1st, 3rd, 12th, 14th, 15th, and 16th conditions, and averred that the plaintiff was interested in the premises insured at the making of the policy and at the time of the loss: that the premises were destroyed by fire, and that all conditions were performed, &c., &c., to entitle the plaintiff to recover.

Pleas, 1.—Did not promise. 2nd. Denial of plaintiff's interest. 3rd. That the plaintiff did not, though requested, make proof by proper vouchers of his loss, and produce evidence and explanations as required. 4th. That the account of loss, and the further evidence and explanations given when required, contained false statements, and the affidavit given under the twelfth condition contained untrue statements within the meaning of that condition, in this, that

the same alleged that the plaintiff was at the time the insurance was effected, and up to the time of the fire, the absolute owner of the said building, and the same was unincumbered, whereas, (negating both allegations), but the same was then owned by other persons, in whom the legal title and ownership thereof was vested, and the same was incumbered by a lien for the unpaid purchase money of the land on which the building was erected.

The plaintiff took issue on all these pleas, and demurred to the last, on the ground that there is nothing shewn in the plea or declaration to support it; that it does not appear that the policy contained any condition of the nature and effect set forth in the plea; and that consistently with the statement in the plea the plaintiff might have been the beneficial though not the legal owner of the premises; and that the plaintiff might be entitled to recover though the premises were incumbered.

Joinder in demurrer.

The case was tried at Chatham, in April last, before Draper, C. J.

The policy was admitted. The twelfth condition was as follows:—

“XII.—Persons insured by this Company, sustaining any loss or damage by fire, are forthwith to give notice thereof at the Office of the Company, or to the Agent of the Company through whom the Policy was effected, and within fourteen days deliver in writing as particular an account of their loss or damage as the nature of the case will admit of, such account of loss to have reference to the value of the property destroyed or damaged immediately before such fire, and shall verify the same by the production of their books of accounts, and by affidavit or a statutory declaration of the claimants, together with the testimony of their domestics, their servants, or other persons in their employ, and such vouchers and other evidence as in the judgment of the Directors, or any of them, or the Agents through whom the Policy was effected, may tend to prove such account and value, and shall produce such further evidence and give

such explanations as the Directors, or any of them, or such Agent as aforesaid, may reasonably require; and until such accounts, declaration, testimony, vouchers, and evidence are produced, and such explanations given, the loss money shall not be payable; and if there shall appear any fraud or any false statement in such account of loss or damage, or in any of such books of account, or in any such testimony, vouchers, evidence, or explanations, or if such affidavit or statutory declaration shall contain any untrue statement, or if it shall appear that the fire shall have happened by the procurement or wilful act, or by the means or connivance of the party or parties insured, or of the claimants, then such parties and all persons claiming under them, or either of them, shall be excluded from all benefit from the insurance, and the Policy shall be absolutely void."

On notice given the defendants produced and the plaintiff put in three affidavits:—

1st. One made by himself, stating the policy, and that he is the party named therein as E. P. Ross: that at the time of effecting the insurance and of the loss he was the absolute owner of the building, and the same was unincumbered; that the said building was on the morning of the 7th July, 1866, destroyed by fire; that he believed the fire occurred about one o'clock in the morning, and he was not aware of the cause of it; he denied neglect, wilful act, procurement, or connivance: that the nearest building on the north-west side of that insured was of one story, of wood, used as a dwelling house, and distant 66 feet; the nearest building on the north-east was of two stories, wooden, and distant 150 feet; the building nearest on the south-east side was two-story, wooden, and distant four feet, and the nearest building on the south-west side was two-and-a-half story, used as a store in connexion with the insured building, and attached thereto. He stated the materials and dimensions of the house destroyed, and that the first floor was used as a store, the other as a dwelling: that about the 1st May, 1866, the defendants' risk was increased by the erection of the two-story building on the south-east side, and a larger premium was required by and paid to their agent, amounting to four

dollars, and that since that day the risk was not in any way increased ; that no coal oil, gunpowder, or other explosive or dangerous commodity was kept in the insured building, except coal oil in very small quantity for the purpose of lighting the same : that at the time of effecting the insurance, and when the fire began, the building was worth \$1,000 in cash, and no portion of it was saved.

2nd. An affidavit to the same effect, jointly made by Napoleon Ross and Nelson Ross.

3rd. An affidavit of Milton Ross, the acting agent of the plaintiff, confirming the plaintiff's affidavit as to ownership, and that the building was unincumbered—as to the destruction by fire, that he was ignorant of the cause of the fire, negating, as far as belief went, wilful neglect or misconduct on the part of the plaintiff, or of any one on his behalf or in his employ, and as to there being no coal oil, &c., and as to the value of the building.

An agreement dated 22nd September, 1865, was put in, made by the agent of the Bothwell Land and Petroleum Company, on behalf of that Company and the plaintiff, for the sale to the plaintiff of lots 136 and 137, in the village of Bothwell, for \$600, payable \$200 cash, the balance in two equal annual instalments with interest. The Company were to give him a deed and the plaintiff to give a bond and mortgage for the instalments.

Evidence of the value of the house, (from \$1,000 to \$1,200), was given, and that it was destroyed by fire.

The defendants' counsel contended that on this evidence there was proof of false statement, as the plaintiff asserted he was absolute owner of the building, and that it was unincumbered. He relied on the twelfth condition, arguing that even if the plaintiff had an insurable interest he was not absolute owner.

The jury were told that the plaintiff had an insurable interest, and was only required to give information of a loss affecting the interest in respect of which he effected the insurance. As the question was brought up on the demurrer, the learned Chief Justice ruled in favour of the plaintiff, with

leave to the defendants to move to enter a verdict, if the Court should be of opinion that the ground of defence was maintained, the fact being admitted that the plaintiff was not otherwise owner than as the evidence given disclosed. If the Court should be of opinion that on the evidence the plaintiff was not owner, within the 12th condition, the verdict to be entered for the defendants.

The defendants' counsel objected that the jury should not have been told that the plaintiff had an insurable interest.

Verdict for the plaintiff, damages \$835.

Hector Cameron obtained a rule calling on the plaintiff to shew cause why the verdict should not be entered for the defendants on the fourth plea, on the ground that the plea was proved, and was a good defence in law; or for a new trial, for misdirection, in ruling that the plaintiff had an insurable interest in the property in question.

During the same term *J. H. Cameron, Q. C., A. Crooks, Q. C., and Anderson*, shewed cause.

C. Robinson, Q.C., and Hector Cameron, contra.

The demurrer to the fourth plea was argued together with the rule.

Beemer v. Anchor Ins. Co., 16 U. C. R. 485; *Richards v. Liverpool and London Ins. Co.*, 25 U. C. R. 400; *Mason v. Agricultural Mutual Ins. Co.*, 16 C. P. 493, were cited on the argument.

DRAPER, C. J., delivered the judgment of the Court.

On the argument, the point as to misdirection was given up (a), and the demurrer and the rule on the leave reserved, both involving the same question, were discussed.

The plea is founded on an alleged breach of the 12th condition, which is set out in the declaration. Everything which the plaintiff under this condition could be required to

(a) See *Milligan v. Equitable Ins. Co.*, 16 U. C. R. 314; *Angell on Ins.* Secs. 66, 69; *Ogden v. Mutual Ins. Co.*, 3 C. P. 497; *Davies v. Home Ins. Co.*, 24 U. C. R. 364; *Stevenson v. London and Lancashire Ins. Co.*, *Ante* p. 148.

do relates to giving a particular account of his loss, having reference to the value of the building destroyed immediately before the fire. This he may be required to verify by producing his papers, by affidavit or statutory declaration, and by other testimony which in the judgment of the directors or agents of the defendants may tend to prove the account of the loss and the value. He must, if required, give further evidence and explanations, and can claim no payment until all this is done.

The plea does not complain of any omission on the plaintiff's part in these respects, nor does it set up any fraud or false statement in the account of the loss or of the value, or in the evidence verifying the same. The false statement complained of is in this,—that it is alleged that the plaintiff at the time of effecting the insurance, and thenceforward till the fire, was the absolute owner of the building, and that it was unincumbered; a matter which, whether legally or technically true or not, would not bear upon the verification of the loss and of the value of the building immediately before the fire. If the building had not become part of the freehold, within the maxim *Quicquid plantatur solo solo cedit*, the plaintiff's statement was literally and substantially true. The building was no part of his purchase from the owner of the soil, for he erected it at his own expense. If it had not (and possibly it had not) become part of the realty, the vendor of the land would have acquired no lien on it. It appears to us that the words "if such affidavit shall contain any untrue statement" should be construed by the context, and read as if there was added thereto "in relation to the account of the loss or the value of the property destroyed," since affidavit can only be demanded for the purpose of verifying the account. The plaintiff was not called upon to make any statement as to the title to the land. This condition does not authorize any call for evidence or explanation as to such title, nor do either of the conditions set out in the declaration refer to anything but "the property, whether buildings or contents" insured, and the statement the falsehood of which is relied on becomes

untrue, not by direct reference to the actual subject matter of insurance, that is, the building, but to the application of the legal principle cited.

No case was referred to as governing the present question. There is, perhaps, some analogy in *Woolmer v. Muilman*, (3 Burr. 1419), which was an action on a policy of insurance on goods on board a ship at and from North Bergen to any ports or places, until her safe arrival in London. The policy was underwritten, "Warranted neutral ship and property." She was lost by stress of weather; but it was established that she was not neutral property. The Court held there was no contract, for she was not neutral property. But in our case it is not suggested that the defendants made the policy upon a representation that the plaintiff was absolute owner, or that the building was unincumbered.

The case of *Cinqmars v. The Equitable Insurance Co.* (15 U. C. R. 143, 246) turned upon the plaintiff's refusal to produce invoices of the goods destroyed.

The language of *Robinson. C. J.*, in *Park v. The Phoenix Insurance Co.*, (19 U. C. R. 121) is very appropriate to this case, though the facts which gave rise to it are different. "The breach of a condition which is to work a forfeiture must, we think, be proved strictly, and it cannot be said to have been proved in this case, if we regard either the terms of the plea or of the condition, or the intent and object of the condition."

It is impossible to hold, even if this plea be true in its largest sense, that it shews any untrue statement which would have made the policy void *ab initio*; on the contrary, it was valid and binding until after the building insured was destroyed, as the matter to avoid it arose *ex post facto*. The default is therefore founded on an alleged forfeiture of a previously valid contract. In such case the condition should be construed with reference to its intent and object, and so construed the untrue statement has no bearing whatever upon or relation to the account of the loss or the value of the building.

We think, therefore, the plaintiff should have judgment on this demurrer, and that the rule should be discharged.

Judgment for plaintiff.

Rule discharged.

ELMORE P. ROSS AND ALLEN ROSS V. THE COMMERCIAL
UNION ASSURANCE COMPANY.

Policy—Proof of assignment.

Action upon a fire policy by A., the person insured, averring an assignment to B & C., notified to defendants and endorsed on the policy, and an agreement by them that it should stand for the benefit of B. & C. Plea, denying the assignment, &c. The policy contained no condition as to assignment. The sale and transfer by A. to B. & C. of the goods insured was proved. An assignment was endorsed on the policy, purporting to be made by A. to B. and C., but signed by D., the agent of A., in his own name, and witnessed by M., defendants' local agent. It was proved that M. entered the transaction in a book kept by him, and communicated with the head office at Montreal; that the Secretary there answered, suggesting a transfer of the policy, and a new policy upon which the premium for the unexpired term of the old policy should be credited; and that afterwards B. & C. paid an additional premium to M. to cover an increase of the risk.

Held, that this evidence was sufficient to sustain the issue for the plaintiffs.

Held, also, that the declarations of B., one of the parties for whose benefit the suit was brought, was admissible as evidence for the defendants.

THIS was an action on a policy of insurance upon goods. The sixth plea (noting the fact that this was a policy on goods, and not on a building) was similar to the fourth plea in the case of Elmore P. Ross against these defendants, *ante*, page 552. The objection raised on the demurrer was similar in substance.

There was also in this case a rule calling on the plaintiffs to shew cause why a non-suit should not be entered, on the leave reserved, on the ground that the plaintiffs were not entitled to recover on the policy and the alleged assignment, under the evidence; or for a new trial, the verdict being against law and evidence, which shewed the policy was not assigned as alleged; and on the ground of the rejection of the statements made by Napoleon Ross, one of the persons

on whose behalf the suit is averred in the declaration to have been brought.

The policy declared on was dated 13th January, 1866, for \$2000, on stock-in-trade contained in a house occupied as a country store, described in the policy. The same conditions were set out as in the preceding case, and in addition the 7th, which was as follows: "The interest of any deceased person in any policy of this Company may be continued to the executor or administrator, or to the person otherwise entitled to the property insured, provided the person so entitled shall procure his or her interest therein to be endorsed on the policy, at the office of the Company; and if property insured be removed to any other situation than where the same was deposited at the time of effecting the insurance, the consent of the Company as to such removal must be obtained, and the policy endorsed allowing the same." Averment of the plaintiffs' interest until the 9th April, 1866, on which day they assigned the same to Napoleon Ross and Nelson Ross, which assignment was notified to defendants, and an endorsement was made on the policy, and the defendants agreed that the policy should stand for the benefit of the assignees, who continued to be interested until the goods were destroyed by fire.

The defendants pleaded, denying (1) the promise; (2) the assignment by plaintiffs, and notice thereof to and endorsement thereof by the defendants on the policy; (3) the plaintiffs' interest at the time of the fire; (4) that the plaintiffs within fourteen days gave a particular account of their loss; (5) made proof by their books, &c., as in the 12th condition required. (6) *Mutatis mutandis* this plea was like the 4th in the former case. (7) That there were false statements as to the value of goods destroyed, inasmuch as N. & N. Ross had not, at the time of the fire, goods insured under the policy of the alleged value, nor were insured goods of the alleged value destroyed.

The trial took place at Chatham, before Draper, C. J., and immediately followed that of Elmore P. Ross against the same defendants.

After putting in the policy, the defendants' agent during 1866 was called, and proved the indorsement on the policy. It was as follows :

We, E. P. and A. Ross, do hereby assign all our right and interest in this policy to N. and N. Ross of Bothwell, in the County of Kent, C. W. Witness our hand this ninth day of April, 1866." (Signed) "Milton Ross." "Signed in the presence of" (Signed) "A. McVittie, agent at Bothwell, and entered in the office books this day."

McVittie also proved a receipt, as follows : "Bothwell, May 1st, 1866 : Received of N. and N. Ross the sum of ten dollars, as extra for insurance on stock." (Signed) "A. McVittie, agent Commercial Union Insurance Company" "on \$2000."

The witness stated that the extra premium was required because an additional building had been erected.

The plaintiffs proved the sale of the stock of goods mentioned in the policy by E. P. and A. Ross to N. and N. Ross, for \$2,900, \$1000 paid, and nineteen notes given, each for \$100, one payable on the 1st of every month after the 1st May, 1866. The bargain was made at Albany, and the witness to it came to Bothwell to make the transfer. The stock consisted principally of boots and shoes, and some groceries.

Milton Ross was the plaintiffs' agent at Bothwell. He helped to take the stock, which, as he swore, exceeded \$2,900, and he transferred the policy, as he said, to carry out the arrangement. He proved the loss by the fire to the extent of \$2000. He said he knew of no agreement that the plaintiffs were to hold the policies until they were paid. He did not remember telling Mr. Livingston he held the policies as security for the plaintiffs.

It was objected for the defence, that the policy did not authorize a transfer; that the plaintiffs having sold the goods could not sue on their own behalf, and in the absence of some condition allowing an assignment, they could not sue as trustees for N. and N. Ross; that Milton Ross had

not signed the transfer on behalf of the plaintiffs, if he was their agent.

The objection was overruled, leave being recovered to move on it.

The defendants then called Frederick Cole, who proved that he was in charge of the defendants' business in Canada, at the head office in Montreal; that this assignment was not entered in their books there, and that they never approved of or permitted it, except as far as McVittie's acts went. He admitted having written a letter to McVittie, dated 11th April, 1866, containing this passage: "In reply to your enquiries relative to the Messrs. Ross, we would say that the balance from the 13th April until the expiry of the year for which they were insured, on No. 49931, is \$13.20, No. 49932, is \$32. The policies will be required to be transferred to N. and N. Ross, when a new application can be made, and the balance (as above) be applied in part payment of the premium, but cannot be so done until the transfer is made."

Mr. Livingstone, the defendants' inspector, swore that he sent a letter of instructions to McVittie to sign and deliver to Mr. McKenzie, an attorney at Bothwell acting for the plaintiffs, and he produced a copy of it, and he produced Mr. McKenzie's reply. (Neither of these were offered to be read). He stated that he conversed with Napoleon Ross after the fire, and with Milton Ross, who gave the witness the impression or understanding that he (Milton) held these policies as security for E. P. Ross, for money due to him. He produced a letter written, as was admitted by the plaintiffs' counsel, by E. P. Ross. (This was not read.) He said he required from Napoleon Ross invoices at each time stock was taken; he understood from the claim papers (which were produced by the defendants on the call of the plaintiffs as part of the plaintiffs' case) that stock was taken every month, but he understood from Napoleon Ross that it was not taken every month. He got some further information as to the stock from Mr. McKenzie, and got a paper (which he produced) by way of additional information, and got no other information. (This paper was a short affidavit from Napoleon Ross.)

At this stage of the proceeding, the plaintiffs' counsel for the first time objected to evidence of the statements of Napoleon Ross, on the ground that he might be called as a witness. The learned Chief Justice sustained the objection. It was not then suggested that being a party for whose benefit the action was brought, he could not be a witness for the plaintiffs, though the defendants might call him.

The defendants then went into evidence of witnesses who were at the fire in July, 1866, some of whom represented the stock before the fire as much less in value than the amount stated by the plaintiffs' witnesses, and others represented that a large proportion of the goods actually there were saved.

The plaintiffs gave rebutting testimony, proving that the goods saved were sold for \$275, and the purchaser being called swore that he found it a bad bargain.

The jury were asked to determine the amount of loss. They were told that under no circumstances were defendants liable for more than \$2000; that the plaintiffs' witnesses did not put the value of the stock just before the fire higher than that sum, and that the goods saved had produced \$275.

They found for the plaintiffs, damages \$1,725.

Hector Cameron obtained a rule *nisi* for a non-suit or a new trial, on the grounds already stated.

The demurrer was argued in this term by *J. H. Cameron*, Q. C., *Adam Crooks*, Q. C., and *Anderson*, for the plaintiffs, and *C. Robinson*, Q. C., and *Hector Cameron*, for the defendants; and later in the term *J. H. Cameron*, Q. C., shewed cause to the rule, which was supported by *C. Robinson*, Q. C., and *Hector Cameron*.

Angell on Insurance, secs. 193, 214, 216; *Lynch v. Dalzell*, 4 Bro. P. C. C. 431, were referred to, on the question of the assignment. As to the rejection of evidence, *Bell v. Ansley*, 16 East, 143; *Doe Rowlandson v. Wainwright*, 8 A. & E. 693; *Goldschmidt v. Hamlet*, 6 M. & G. 187; *Bonner v. Moderwell*, 9 C. P. 309; *Tay. Ev.*, 4th Ed., secs. 686, 719.

DRAPER, C. J., delivered the judgment of the Court.

It is unnecessary to repeat the reasons why, in the former case, the fourth plea was held bad. They have at least equal strength as against the sixth plea, which relates to goods, and not, as in the former case, to lands. Very little was said in defence of it as a legal answer; as a matter of fact the evidence went altogether to disprove it. The real question arose about the sufficiency of the evidence to shew an assignment of the policy. An absolute assignment and transfer of the goods themselves was proved.

As to this question, the facts following the assignment of the goods, of which there was evidence were:—(1) The memorandum indorsed upon the policy, and attested by Mr. McVittie, who was at the time the defendants' local agent at Bothwell. (2) That a communication was made by him to the head office at Montreal, and that he made an entry of the transaction in a book, which he produced. (3.) That their Secretary or officer at Montreal, by a letter of the 11th April, 1866, recognised the receipt of notification that N. and N. Ross had become interested in the goods, and either suggested or consented that the policy on them (and apparently that upon the building also) might be transferred, and that a proportion of the premium, which had been paid for the policy covering the goods until the 13th January, 1867, might, after such transfer and from the 13th April, 1866, be treated as paid by N. and N. Ross by way of premium on a new policy to be applied for by them, and to be granted by defendants to insure this same stock. (4) The payment on the 1st May, 1866, upon the policy on this stock of \$10, as additional premium, to cover an increased risk of which they had given Mr. McVittie notice.

In the face of this evidence it appears to us quite impossible to order a non-suit to be entered. If a jury, on its being submitted to them, sustained the plaintiffs' contention on the second issue, we do not, as at present advised, think their decision could be set aside by the Court.

But after a fuller consideration than I could give at *nisi prius*, we are not prepared to uphold the rejection of the

evidence of declarations of Napoleon Ross. It is possible, as was suggested in argument, that these declarations might have been made at a time and under circumstances when they would not be admissible on the trial of these issues. But the plaintiffs' counsel interposed his objection when no such facts as his argument now suggests were proved, and when therefore no such ground for the rejection was established. We think the ground on which they were rejected, namely, that Napoleon Ross might have been called as a witness by the defendants, is not tenable, and therefore there must be a new trial without costs.

Rule absolute.

REID V. THE BOARD OF AGRICULTURE FOR UPPER CANADA.

Misrepresentation—Action for—Pleading—Uncertainty.

Declaration, that the defendants owning the land upon which the Provincial Exhibition was to be held, advertised that certain portions would be let by auction for the purpose of refreshment booths; that the plaintiff attended and leased one of such portions: that at the said auction the defendants made certain statements and representations as to the positions of the gates and entrances to the Fair grounds, the number of persons to be allowed to sell refreshments, and the relative positions of the booths, on which the value of the plaintiff's letting was estimated and depended, and relying on which the plaintiff purchased and erected a booth; but that the defendants deviated and departed from such representations, and so changed the position of the gates, and the number of the booths, that the plaintiff's letting became useless to him.

Held, that no cause of action was shewn, for the declaration was for a wrong, and the statements were not alleged to have been false when made, or to have been made in order to induce the plaintiff to contract.

Semble, that the declaration was also bad, in not stating what the representations were, and how departed from.

DECLARATION.—That before the committing of the grievances hereinafter mentioned, the defendants were possessed of a certain parcel of land situate and being in the City of Toronto, upon which the Annual Fair for Upper Canada was about to be held, and being so possessed thereof, the defendants publicly advertised that certain parts or portions of the said land, marked out and designated by stakes and

numbers, would be let by auction to such person or persons as should be willing to rent the same for the purpose of erecting booths or sheds thereon, wherein refreshments might be furnished to those who should attend the said Fair, and such parts or portions of the said land so marked out and designated as aforesaid, were accordingly let by auction. And the plaintiff saith that he attended the said sale, and purchased and became the tenant of a certain part of the said ground of the defendants for the time that the said Fair should last, being one of the portions so marked out and designated as aforesaid, for the purpose of erecting a booth thereon in which he might sell refreshments to the persons attending and visiting the said Fair. And the plaintiff further saith, that at the said auction the defendants made certain statements and representations as to the positions of the gates and entrances to the said Fair ground, and the number of persons to be allowed to sell refreshments therein, and the number and relative positions of the several refreshment booths to be limited and allowed therein, on which statements and representations the value of the said letting so purchased by the plaintiff was estimated and entirely depended; and that relying upon the said statements and representations of the defendants so made at the said sale, and upon the value given to the said letting in preference to the other lettings thereby, the plaintiff purchased his said letting for the sum of \$230, and erected a booth thereon as aforesaid, the defendants having placed him in possession of his said part of the said ground for that purpose; but the defendants afterwards, and before the opening of the said Fair, without the consent of the plaintiff, entirely deviated and departed from the said statements and representations they had so made as to the position of the said gates and entrances to the said grounds, and the number of persons to be allowed to sell refreshments therein, and the number and relative positions of the several refreshment booths to be limited and allowed therein as aforesaid, on which the value of the said letting entirely depended as aforesaid, and according to which the

plaintiff had purchased his said letting and erected his booth as aforesaid; and so changed and varied the position of the gates and entrances to the said ground, and the number and relative positions of the several refreshment booths allowed therein, and the number of persons allowed to sell refreshments therein, that they wrongfully and injuriously diverted from the plaintiff a large portion of the trade which he would otherwise have enjoyed in selling refreshments to the persons visiting the said Fair, had not the defendants so departed from their statements and representations, on which the said plaintiff took and purchased his said letting as aforesaid. And by reason of the said wrongful act of the defendants, the said parcel of ground so rented from the defendants by the plaintiff became and was of no value to the plaintiff, and the plaintiff suffered loss and damage thereby to a large amount, to wit the sum of \$1,000.

Demurrer and Joinder.

Dalton for the demurrer. Where representations made at the time of the contract are not embodied in it, there must be moral fraud to sustain the action: *Moens v. Heyworth*, 10 M. & W. 147, and *Cornfoot v. Fowke*, 6 M. & W. 358, are among the cases to that effect, but the authorities are uniform on the point. There is no averment of fraud here, nor of falsehood. Then as to the uncertainty. It is not averred what the defendants said, but only that they "made certain statements;" nor is any certain breach assigned, the deviations complained of are not specified. The uncertainty here makes the declaration unintelligible, and is therefore ground for general demurrer; *Holmes v. Hodgson*, 8 Moore 379. In *Ward v. Harris*, 2 B. & B. 265, where it was averred that the plaintiff sold to defendant a *certain horse* for a *certain quantity of certain oil*, to be delivered *within a certain time*, it was held to be cured by the verdict, but it would clearly have been bad before.

J. H. Cameron, Q.C., contra. As to the uncertainty, nothing but a map of the ground with the different lettings would

have sufficed according to the defendants' argument; the declaration is sufficient on general demurrer, but the plaintiff must make out a definite cause of action on his evidence. As to the cause of action, it is not the fact of the statements being false, but that they became false by something subsequent. They could not have been alleged as false at the time, because they were true. Having put the plaintiff into possession according to the statements made at the time of letting, and then having afterwards changed the arrangement, they are liable in this form of action. Supposing a man should sell land, telling the vendee that he is going to make a street there, which he does not do, the vendee would have an action, and might either sue on the contract or for the false representation. [HAGARTY, J.—Can you ever sue a man for a representation, truthful when he made it?] Yes. If you make a representation false at the time, and I contract on it, the contract is void as against me; then if made, and if in effect made false by something done afterwards by the party making it, I must have a remedy for this, and I may have it in this form as well as for breach of the contract. Forms of action are now abolished, and if you shew a good cause of action, whether in contract or case, the plaintiff is entitled to recover on it. Add. Con. 127, 128, 203; *Schneider v. Heath*, 3 Camp. 508; *Pawson v. Watson*, Cowp. 788; *Adamson v. Jarvis*, 4 Bing. 73; *Langridge v. Levy*, 2 M. & W. 519; S. C. In Error, 4 M. & W. 337.

Dalton, in reply. The action is for a representation made at the time of the contract. For such a representation there may be an action on the contract if the representation is included in it, or an action for a false representation if it was false at the time; but there is no other cause of action known to the law in such a case. *Williamson v. Allison*, 2 East 446; *Taylor v. Ashton*, 11 M. & W. 413; *Ormrod v. Huth*, 14 M. & W. 651.

HAGARTY, J., delivered the judgment of the Court.

The declaration is, in substance, that defendants in selling

at auction the right to hold a certain piece of land for a refreshment booth at the Provincial Exhibition, made certain statements as to the position of the gates and entrances, the number of persons to be allowed to sell, and the number and position of the booths, very material to the value of the parcels, on the faith of which the plaintiff purchased his allotment at a named price; that afterwards, and before the exhibition, the defendants wholly deviated from these statements, and altered the position of the gates and the number and position of the booths, &c., on which the value of the plaintiff's holding depended, thereby diverting from him a large portion of the trade and rendering his holding of no value.

We think this pleading is open to the demurrer. We have looked through all the cases relied on by Mr. Cameron in support of it, but they have failed, we think, to support his view.

The facts could only give a cause of action on one of two grounds: 1st. That they were representations or warranties forming such a material part of the contract of letting as would by their non-observance warrant the plaintiff in rescinding the bargain and refusing to complete his part of it, or warranting his suing them for their breach and for damages consequent thereon; or, 2ndly, that they were representations false at the time of making, and made with a view to induce the plaintiff to alter his position by entering into this contract, to his damage.

This count does not profess to call them false at the time, They may have been made in perfect good faith, and defendants afterwards have changed their minds. We think on the second ground it is impossible to support the pleading.

Mr. Cameron further urged that the count may be read as charging a breach of contract, and thus falling within the first state of facts.

We cannot so read it without further confounding the few remaining rules that should be preserved to ensure some intelligibility in pleading.

The matters charged seemed to us not laid as part of the contract, but as matters outside the contract, not affecting

its validity as a contract. If no part of the contract, then it can only be, we think, on some grounds of bad faith or misrepresentation of existing facts that an action would lie. It would be quite intelligible to allege that in consideration of the plaintiff becoming tenant of the parcel of land, the defendants made certain engagements with him as to the position of the entrance gates, number of booths, &c., and as to what defendants should do and provide at the ensuing exhibition, from which engagements they afterwards deviated, to the plaintiff's damage. But we cannot so read this count.

As to the other ground of demurrer, the omission to state what the representations were and in what respect they were departed from, we incline to think the pleading insufficient. We do not see the force of the plaintiff's suggestion that it could only be shewn by reference to maps or plans. The change in distance from entrance gates, the number and position of the latter, and of the booths, could all be succinctly stated.

We think there should be judgment for the defendants, with leave to the plaintiff to amend, if so advised, on payment of costs.

Judgment for defendants.

HUSKINSON V. LAWRENCE, ET AL.

Lease—Construction—Distress.

Lease dated 15th December, 1862, for five years, at an annual rent, half payable on 1st January, and half on 1st February following in each and every year during the term, with an agreement at the end that the first payment of rent should not become due until the 1st January, 1864.

Held, that this agreement did not prevent any rent from falling due in 1863, but was limited to the first payment to be made on the 1st January, 1863, or at most to the rent for the first year; and that two years' rent therefore was due before the 17th November, 1864.

Part of the plaintiff's goods having been distrained for rent off the premises—*Held*, that he might recover their value either in trespass or trover.

The rent due was \$401, and the value of the goods distrained \$469—*Held*, that the difference was insufficient to support an action for excessive distress.

DECLARATION.—The first count stated that one T. H.

held certain premises, being a farm, &c., as tenant to the defendant Lawrence, at a rent : that at the time of committing the grievances, certain goods of the plaintiff, as the defendants well knew, were on the said premises, yet the defendants wrongfully seized the plaintiff's said goods, of the value of £200, as well as all the goods of the tenant, as a distress for \$401.40 claimed to be due by the defendants from T. H. to the defendant Lawrence, and sold all the goods so seized for the rent and costs, whereas only a small part, *i. e.* \$38.50, of the pretended rent was in arrear, and one-fifth part of the plaintiff's goods so distrained would have been sufficient, and the goods of T. H. alone were more than sufficient.

Second count.—That defendants wrongfully distrained for arrears of rent due by T. H. (as before), goods known to the defendants to be the plaintiff's goods, of much greater value than the arrears claimed, and the tenant's goods on the premises were of themselves sufficient to satisfy the arrears.

Third count, founded on the same tenancy and seizure for rent in arrear, for selling the plaintiff's goods for less than the best price.

Fourth count.—Trespass for taking the plaintiff's goods, stating them.

Fifth count.—Trover for the same goods.

Pleas 1st. To the whole declaration, Not Guilty, *per stat.* 11 Geo. II., ch. 19, s. 21. Demurrer to the first count, and judgment for the defendants. Demurrer to the second count, and judgment for the plaintiff (a).

The trial took place at the Spring Assizes, 1867, for the County of York, before Richards, C. J. The plaintiffs put in

1. A lease, dated 15th December, 1862, made by the defendant Lawrence to Thomas Huskinson, of lands in the Township of Garrafraxa, to hold for any term of years not exceeding five from the date thereof, yielding and pay-

(a) See the demurrers reported, 25 U. C. R. 58.

ing the yearly rent of \$220, one half to be paid on the first day of January, and the remaining half on the first day of February following, in each and every year during the said term; and provided the said T. H. shall leave the premises in the course of one year from the said date, they shall be left in their then present condition, and if occupied by the lessee for more than one year, the premises are to be left all seeded down, and on the expiration of said term, or sooner termination thereof, the lessee shall peaceably surrender possession. And if the lessee shall leave before the expiration of the said five years, he shall give notice thereof in writing three months before leaving. And it is particularly agreed that the first payment of rent shall not become due until the first day of January, 1864.

2. A landlord's warrant, dated the 17th November, 1864, signed by the defendant Lawrence, and addressed to the defendant Wallace, for \$220, being one year's rent "due to me on or about the first day of November, 1863," and also for the further sum of \$181 40, being the balance of one year's rent "due to me on or about the first day of November instant (1864)."

A seizure was made under this warrant by the defendant Wallace, which was, after appraisement and notice, followed by a sale. The plaintiff proved that he was owner of some of the property seized, and that a portion of his property had been distrained off the demised premises. His witnesses valued these things much higher than they had been appraised at, and still higher than the price for which they were sold.

The tenant was called as a witness (he was the plaintiff's father), and he swore to an understanding with his landlord that the value of work done by him for the landlord, pasturage for his cattle, and of grains furnished, as well as some other claims he advanced, amounting in the whole to \$359 63, should be allowed against the rent, which he insisted was due for only one year at the time of the distress. But against part of this demand Lawrence advanced a

counter claim, besides being apparently entitled to deduct \$75.70, as erroneous, charged for some wheat; and on the tenant's shewing it seemed that he owed \$115 07 on the first year's rent, to which the defendants contended a second year's rent, \$220, should be added, while Lawrence repudiated the tenant's claim, and put in a receipt signed by him, dated the 17th November, 1866 (the day before the distress), by which the tenant admitted that he had settled with Lawrence, and that he was due to him for rent, \$401 40. The tenant explained this receipt by representing that it was given to enable Lawrence to cover his (the tenant's) goods from an expected execution, by the claim for rent.

The learned Chief Justice told the jury that if no rent was due the plaintiff was entitled to recover the full value of his property seized: that unless the rent was paid, the fact that the tenant had an account against his landlord for pasturing cattle and the like, did not prevent the landlord from distraining: that the plaintiff was entitled to recover the full value of his property distrained, and not upon the demised premises, on the count in trespass: that if the first year's rent was not paid, the landlord had a right to distrain: that as to unreasonable distress, it must be unreasonable in reference to the \$401 claimed for arrears of rent; and he left the question as to selling for less than the value to the jury, with observations favorable to the defence.

The Jury found one year's rent paid, but not two; that the plaintiff's property seized and sold was worth \$469, to which they added \$200 damages, apparently because they thought no rent was due. They valued the horse and pigs which had been seized off the premises at \$90, and gave damages for improper conduct at the sale, \$100, half of the \$200 above mentioned; and gave their verdict upon these findings generally for the plaintiff, for \$669. Leave was reserved to move this Court to reduce the verdict to \$90 or to \$100 respectively, on the counts for trespass, and for the improper conduct of the sale.

McCarthy obtained a rule calling on the plaintiff to shew cause why there should not be a new trial, on the law and evidence, on the ground that a large part of the rent was unpaid, and that the finding no rent was due was, at all events, contrary to the weight of evidence: that the verdict was perverse, in finding that one year's rent was paid: that the finding that the plaintiff's goods were not sold for the best price was against evidence; or, that a verdict should be entered for the defendants on the second and third, and on either the fourth or fifth counts, and the damages be reduced to \$90 on the fourth or fifth count, as the plaintiff might elect: that according to the lease, there were two years' rent in arrear at the time of making the distress, which was therefore warranted, as the jury found that only one year's rent had been paid.

Robert A. Harrison shewed cause, citing Woodf. L. & T., 7th Ed., 314, 330; Arch. L. & T. 289.

DRAPER, C. J., delivered the judgment of the Court.

The construction of the lease is the principal question. But for the particular agreement at the end there could be no reasonable doubt. The term is for five years from the 15th of December, 1862. An annual rent of \$220 is reserved, half to be paid on the 1st of January, and half on the 1st of February following, in each and every year during the term. The term will expire on the 14th of December, 1867. According to the express words, the first year's rent would be payable, half on the 1st of January, half on the 1st of February, 1863; the parties, by the agreement which gives rise to the difficulty, have put this construction on their contract. This agreement provides "that the first payment of rent shall not become due until the first day of January, 1864." It is argued for the plaintiff that the effect of this agreement is to postpone the whole first year's rent, because the second half could not be due until the 1st of February "following" the day when the first half became payable, and it is insisted that on the 17th of November, 1864, when the distress warrant was issued, only the first year's rent was due.

The rule of law is, that a deed shall be so construed that each part shall be effectual if they can stand together. By taking the parts separately it will be seen what is the meaning of each, and then the conflict of one with another being examined, it will appear whether one wholly overrides or only partially changes the other or others with which it is inconsistent. We think that the *reddendum* clearly reserves an annual rent to be paid within each year of the term, that is, as to the first year, within twelve months from the 15th day of December, 1862; that it is divided into two payments, one being due on the 1st of January, 1863, the other on the 1st of February following; and we infer, as an inevitable consequence, an intention of paying the rent in advance of the period at which, treating it as a yearly rent, it would otherwise fall due. It might be a telling point with a jury that the plaintiff was and did expect to make the rent out of the land, and that he procured the postponement with this object, extending over the whole term, but it is no argument to assist the Court in construing the language used.

We think also that the agreement at the end of the deed clearly postpones the payment which in the *reddendum* is fixed for the 1st of January, 1863, until the 1st of January, 1864; but the plaintiff's contention is that by this latter clause the *reddendum* is wholly changed as to time of payment, and that no part of any year's rent is payable within that year of the term in respect whereof it is reserved—in other words, that the rent for the first year is payable by moieties on the first days of January and February respectively in the second year, and so on to the end.

The consequence will be in two respects an entire departure from the intention of the *reddendum*: first, as to the rent being paid in advance; second, that each year's rent should be due and payable within that year. Now, although we do not adopt the defendants' argument, that the latter agreement is so entirely repugnant to the *reddendum* that it must be wholly

rejected, we think it much more reasonable, and more consistent with the intention of the parties, taking the whole deed into consideration, to treat the last clause as limited to the payment at first reserved to be made on the 1st of January, 1863. This literally gives it a full effect, and while doing so, it avoids that entire subversion of the mode of payment which the *reddendum* clearly required. The plaintiff's construction is, that no payment whatever is to be made during the first year, and that by agreeing that the first payment of rent shall not become due until the 1st of January, 1864, the defendant has agreed that only the first year's rent shall become due in 1864, and that the rent for each succeeding year, which was at first made payable on two days in each and every year during the term, shall not be payable until the following year, so that the last year's rent will not be due until after the expiration of the term. We think that the change affects only the first payment, or at the utmost the rent for the first year, and that the payment of the rent for the second and subsequent years is not affected by the special agreement. See *Gilbert on Rents*, 50, 51; *Tompkins v. Pincent*, Salk. 141; 7 Mod. 97.

In our opinion, therefore, two years' rent had accrued due before the distress warrant, and if the jury have rightly found that the first year's rent was paid (a conclusion to which the evidence has not brought my mind), the defendant Lawrence had a right to distrain.

By the reservation of leave to move to reduce the verdict, two questions are opened—first, whether the plaintiff should retain the sum of \$100 damages, and, if so, whether on the second or third count; second, whether the sum of \$90, the value of the horse and pigs, should be entered as damages on the fourth or fifth counts.

As to the last question, the original taking of these animals, being off the demised premises, was clearly a trespass, and the verdict may be properly entered on the fourth count for their value, though the plaintiff might waive the trespass and bring trover, so that the damages might be recovered on the fifth as well as on the fourth. *Branscomb v. Bridges* (1 B. & C. 145).

The second count charges the distraining of the plaintiff's goods of much greater value than the arrears claimed, besides averring that there were goods of the tenant on the premises sufficient to satisfy the arrears. No question was submitted to the jury on this latter point, and the learned Chief Justice was not asked to draw their attention to it. The point was only discussed in reference to the value of the plaintiff's property. The claim for rent was \$401, and the tenant had signed an admission the day before the distress that so much rent was due. The value of the plaintiff's goods distrained (a part of which valued at \$90 were seized off the demised premises) was found by the jury to be \$469. According to the opinions expressed in several cases, this difference is not sufficient to form the ground of an action, and still less so if he recovers \$90 of that value in trespass or trover. He was not, though owner of these goods, entitled to recover double value under the 2 W. & M. c. 5., s. 4., for there was rent due, and the report of the learned Chief Justice shews his impression that the jury intended to give these damages because they thought that only one year's rent was due and had been paid. On this count therefore we think the plaintiff ought not to recover.

But the third count is for selling for less than the best price, and when the jury explained that they gave \$100 for the improper conduct of the sale, they must be taken to have founded their verdict *pro tanto* on this count. As a question of fact it was for them, and we see no legal obstacle to the plaintiff's recovery on this count.

On the whole, therefore, we are of opinion that the verdict should be reduced to \$190, of which \$100 should be entered as damages on the third count, and the remainder as damages on the fourth or fifth count, as the plaintiff may elect. The verdict should be entered for the defendants on all the other counts, except the first, which was disposed of on the demurrer.

Rule absolute accordingly.

HENRY DEAL, ADMINISTRATOR OF SIMON DEAL V. CATHARINE AND DANIEL POTTER.

Replevin—Evidence of taking—Damages.

Replevin will lie in this country, though there has been no wrongful taking, but a detention only is alone complained of, and this though the writ and declaration charges both, for every detention is a new taking. The title of an administrator relates back to the death of the intestate, so as to enable him to replevy goods taken before the grant of administration. In this case the defendants were the widow of the intestate and her second husband. It was shewn that she had taken possession of and appropriated to her own use the intestate's property, and acts and declarations of both defendants established that they held it together after her second marriage. *Held*, sufficient evidence of a joint taking.

Held, also, that the plaintiff might recover as damages the value of any of the property in the defendants' hands at the time of issuing the writ, though not actually replevied.

Semble, if it had been shewn that the widow had paid funeral expenses or debts of the intestate, this might have been allowed in mitigation of damages.

THE DECLARATION charged that the defendants seized and took the goods, chattels, farm stock, furniture, moneys, bank bills, promissory notes, and effects of the plaintiff as such administrator, that is to say, (here followed a long enumeration) and wrongfully and unjustly detained and still detain the same from the plaintiff as such administrator, against sureties and pledges, whereby he hath sustained damages; and he claimed a return and delivery to him of the said goods or their value, and \$4000 for their detention, and under the residue of the declaration \$500.

Pleas—1. *Non ceperunt*. 2. That the defendants did not, nor do, nor did, nor does either of them, detain the said goods, &c. 3. That the said goods, &c., were not the plaintiff's. Issue.

The case was tried at the last Spring Assizes for the County of York, before Richards, C. J.

It appeared that the plaintiff on the 12th of February, 1867, issued a writ of replevin to the Sheriff of York, enumerating therein stoves, waggon, household furniture, agricultural implements, carpenter's and shoemaker's tools, a watch, a sword, guns, a silver candlestick, a valise, and chests, (some of which were supposed to contain about \$3000 in

silver, bank bills, and promissory notes), several promissory notes—in all alleged to be of the value of \$3,500, which defendants had unjustly taken and detained. The Sheriff returned that he had replevied to the plaintiff a portion of the things named in the writ, setting them out particularly ; among them were four promissory notes, amounting together to \$147 ; and that he could not find the residue of the articles named in the writ in the defendants' possession, or in that of any person for them.

It was proved that the defendant Catharine had been the second wife of Simon Deal, to whose estate the plaintiff was administrator ; that Simon Deal died in May, 1866, and that in the month of November following, she (Catharine) was married to the defendant Daniel Potter. The plaintiff was a nephew of Simon Deal. According to the evidence, the intestate, besides real estate, died possessed of considerable personal property. Shortly after his death some of the neighbours, at the widow's request, who apparently meant to administer, valued a part of the chattels at \$130.50, excluding beds and bedding, a watch, and many other articles which she asserted he had given to her. At that time she produced some notes of hand amounting to \$842, three or four deeds and a mortgage, and three or four rolls of bank notes, which were not counted, but were on her statement assumed to contain \$100 each. She said she had other promissory notes, which she meant to put in suit. At a subsequent time, as one Hanna swore, he counted for her \$700 in bank notes, which she put into a pocket book containing other bank notes, and said it made up \$3000, which was her late husband's. She could not read or write, or, as she said, tell what was the amount of a bank note.

To others she spoke before her second marriage of having plenty of money left by her deceased husband : that she would have administered, but had not succeeded in obtaining the necessary sureties. Since her marriage she spoke of having notes of hand other than those given by her to the defendant Daniel, which she had kept in her own possession. Since her marriage to the defendant Daniel he had

frequently spoken of what money he had, speaking of it as having been the money of the intestate, shewing considerable sums at different times, and talking of collecting notes which he had received from his wife to the amount of \$700 or \$800. He shewed, according to Hanna's evidence, two notes, each for \$100, against two persons in that neighbourhood, which were payable to the intestate. He spoke of having the silver candlestick. He spoke in a boastful manner about his money, being frequently in a state of intoxication, saying he had not married the old woman, but had married \$3000. It appeared by other testimony than Hanna's that there were three notes, each for \$100, two made by William Mackey and one by Abraham Mackey, his son, which were not among those replevied. The defendant Daniel was a son-in-law of William Mackey. Some of the plaintiff's witnesses bore rather a suspicious character, and Hanna had been arrested on a charge of gambling made by Potter.

The learned Chief Justice directed that as to the property replevied the action was sustainable, and that damages might be recovered for the detention : that as to the property of the intestate given to Daniel Potter by his wife before this action, and which he had in his possession at the time of the issue of the writ of replevin, the plaintiff might recover its value by way of damages, and he left the matter upon this footing as a question of fact for the jury. He told them to find the value of the goods which were replevied, and to give a verdict and \$2 damages. He further asked them to state the value of the property the defendant Daniel had in his possession at the commencement of this action, that had belonged to the intestate, and which had come into the possession of his widow, and had been delivered by her to him before that time.

The jury valued the goods which had been replevied at \$138, and they assessed damages for the value of the goods and effects not delivered on the writ of replevin at \$2,000, and said they found that this amount was in the possession of the defendant Daniel, in addition to those which were replevied, at the time the other things were replevied.

The defendants' counsel objected: 1. That the plaintiff had no right to recover in this action, except as to the goods taken on the writ of replevin.

2. That there was no evidence of the taking of the plaintiff's goods by these defendants before the suit.

3. That there was no evidence of detention by these defendants before the suit: that there must be some demand or notice before replevying; and the same evidence was necessary as in detinue.

4. That there was no evidence of a joint taking or detention as charged: that the evidence shewed a taking at one time by the widow and at another time by the defendant Daniel, but not a joint taking by the two.

Robert A. Harrison obtained a rule calling on the plaintiff to shew cause why there should not be a new trial, on the ground of misdirection: 1. In ruling that as to the property replevied the action was maintainable. 2. That as to any property received by the defendant Daniel from the defendant Catharine before the issuing of the writ of replevin, and which was in his hands at the time of the issue of the writ, although not replevied, damages were recoverable; or for a new trial, the verdict being contrary to law and evidence and the weight of evidence, and for excessive damages.

J. A. Boyd shewed cause, citing, as to the necessity for demand, *Anderson v. McEwan*, 8 C. P. 534; *Bryce v. Beattie*, 12 C. P. 409; *Tharpe v. Stallwood*, 5 M. & G. 760; *Morgan v. Thomas*, 8 Ex. 302; *Montague v. Lord Sandwich*, 7 Mod. 99; Chy. Plg. Vol. I. p. 176; *McCarthy v. Donovan*, 13 Ir. C. L. R. 195; *Dejoncourt v. Rogers*, 8 Ir. L. R. 450. As to maintaing the action against defendants jointly, Co. Lit. 351 b; *Mounson v. Bourn*, Cro. Car. 518; *Garth v. Howard*, 5 C. & P. 346; Saund. Pl. & Ev. 557; Bac. Abr., Baron and Feme, L; Com. Dig. Baron and Feme, Y.; *Jones v. Dowle*, 1 Dowl. N. S. 391; S. C. 9 M. & W. 19. As to the right to damages, *Tidd's Practice*, 9th Ed., p. 887; Ch. Arch. Prac., 12th Ed., p. 1092; *Gilbert on Replevin*, 144-5; Bull. N. P. 52, 53 a, 58 b; Fitzh. N. B.

69 L; *Petree v. Duke*, 2 Lutw. 1147; *Anon.* Godbolt, 98, Case 111; *Evans v. Elliott*, 5 A. & E. 142; *Mennie v. Blake*, 6 E. & B. 842. As to the evidence, *Catterall v. Kenyon*, 3 Q. B. 310; *Robinson's Practice* (U. S.), Vol. III. p. 479-80.

Robert A. Harrison, contra, cited *Hartley v. Moxham*, 3 Q. B. 701; *West v. Nibbs*, 4 C. B. 172; *Blades v. Higgs*, 4 L. T. Rep. N. S. 551; S. C. 7 Jur. N. S. 1289; B. & L. Prec. 338.

DRAPER, C. J., delivered the judgment of the Court.

The law of replevin is regulated by that adopted by us from England, altered by the Consol. Stat. U. C. ch. 29, and the Stat. 23 Vic., ch. 5. The first section of the Consolidated Act authorizes, (1st) that replevin may be made in cases of wrongful distress in which it might be made by the law of England; and provides (2nd) that in case any goods, &c., have been otherwise wrongfully taken or detained, the owner capable of maintaining an action of trespass or trover for personal property, may bring an action of replevin for recovery thereof, and for the recovery of damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses. A copy of the writ is to be served, as in the case of an ordinary writ of summons, and the writ prescribed by the act directs the Sheriff not only to replevy, but to summon the defendant to appear and answer the plaintiff, in a plea of unjustly taking and detaining, or of unjustly detaining, as the case may be. Some part of the property mentioned in the writ must be replevied before the Sheriff serves a copy of the writ, so that the action can only proceed against a defendant after an actual seizure of some goods, &c., by the Sheriff. Upon the defendant's appearance, the declaration, avowry, and other pleadings are to be according to the practice in replevin in England, but within the periods respectively fixed for declaring, &c., in ordinary actions; and when the action is founded on a wrongful detention, and not on the original

taking of the property, the declaration shall conform to the writ, and may be the same as in an action of detinue.

The language of our Statute, though it might easily have been more clear, intends that whoever could maintain trespass for the wrongful taking of his goods by another, or trover by the wrongful conversion of his goods by another, may have a writ of replevin to take those goods, founding the claim on such wrongful taking and a subsequent detention, or upon a detention only. This construction has, we think, generally obtained in practice, and is, in part at least, sustained by decision. See *Cook v. Fowler* (12 U. C. R. 568; *Ferrier v. Cole* (15 U. C. R. 561). But our Legislature has obviously sanctioned a course in reference to detaining which falls within the objection stated in *Mennie v. Blake* (6 E. & B. 850): "If, wherever a party asserts a right to goods in the peaceable possession of another, he has an election to take them from him by a replevin, it is obvious that the most crying injustice might not unfrequently result." And in the same case it is said (p. 849) that "it seems clear replevin is not maintainable unless in a case in which there has been first a taking out of the possession of the owner," a remark illustrated by the further observation, that the defendant in that case "acquired the possession neither by fraud or violence, * * and he retained the possession on a ground which might justify the retainer until the alleged ownership was proved. This, therefore, in our opinion, was a case in which the plaintiff could not proceed by replevin, but should have proved his prior right in trover or detinue." *Vide Mellor v. Leather* (1 E. & B. 628-9). Our Statute clearly overrides this latter conclusion.

This case comes before us on a motion for new trial, first, for misdirection, in ruling that the action was maintainable on the evidence, as to the property not replevied. It was urged at the trial that the jury should have been told that the plaintiff had no right to recover except as to the property replevied, and this was repeated in the rule. But as the objection to the ruling involves the sufficiency of the evidence, it may admit that a writ of replevin would lie against the

defendants at the plaintiff's suit as administrator for the goods of the intestate actually replevied, but deny that the evidence proved the case against the defendants. Two points may have been intended to be raised—whether a writ of replevin will lie where there has been no wrongful taking, and whether as against both defendants there was evidence of taking.

We feel no doubt but that the goods may be replevied under our act, though they came to the hands of the possessor without a taking out of the actual possession of the legal owner. The right to have a writ of replevin given by the Statute to a person who could have maintained trover for the same personal property (for so we construe the act) involves the admission that the possession need not have begun tortiously, and the 17th section of the Consolidated Act is to the same effect. There may be questions on the form of declaration or the sufficiency of the proof, but not as to the right to replevy the goods; and our Statute 23 Vic. has interposed checks upon attempts to pervert the former act to purposes of injustice. That act, however, continues to give a right to the writ in cases where detention is alone complained of. In the abstract we think the ruling was correct, namely, that the plaintiff might recover for property replevied, although he only proved a detention by the defendants.

Then arises the consideration, that the writ which was put in evidence directs the replevy of the property mentioned, which the defendants "have taken and unjustly detain," and the defendants are summoned to answer for taking and unjustly detaining, &c. The declaration charges that defendants seized and took, and wrongfully and unjustly detained, and still detain, &c.

In *Waters et al. v. Ruddell et al.* (11 U. C. R. 181), the declaration was nearly the same. *Non cepit* was pleaded, but the plaintiffs failed in shewing any unlawful taking, and it was objected for the defendants that where the plaintiffs declared both for taking and detaining they were bound to prove an unlawful taking, and could not recover on proof of an unlawful detention alone; but though the verdict was for the

defendants on the plea of *non cepit*, they failed upon a plea of lien, and the Court held the plaintiffs were entitled to recover, and discharged a rule for a non-suit. Whether, upon the principle that every unlawful detention was a new taking, the plaintiffs were not entitled to have the verdict entered for them on the plea of *non cepit* also as of course, the Court could not, on a rule to enter a non-suit, properly determine, but the observations made in giving judgment lead to that result. If therefore no taking had been proved, the plaintiff, upon the two other pleas, would be entitled to recover if he succeeded upon them or either of them.

Upon the plea denying his property there was no doubt. No doubt was intimated as to the relation back of his title to the death of the intestate. In *Tharpe v. Stallwood*, (5 M. & Gr. 760) where it was decided that an administrator might maintain trespass for acts done after the death of the intestate and before the grant of administration, it was conceded throughout that trover would lie, the distinction unsuccessfully pressed being that trespass implies possession in fact or in law at the time of the act complained of, while trover depends on the right of property, as to which there was a relation to the time of the intestate's death, as soon as administration was granted. Our act gives the writ of replevin to the party who could maintain trespass or trover. It is given, as it were, supplementary to or in aid of the remedy which those actions afford.

As to the taking, however, we think that there was evidence for the jury against the defendant Catharine, upon the principle suggested as to unlawful detention; and independently of that, her own acts and declarations while a widow made a strong case against her of an appropriation to her own use of the property and effects of her late husband; and that there was evidence of a joint taking after the marriage by the acts and declarations of both. She would, on the evidence given, be liable to a creditor of the intestate as executrix *de son tort*, and not only might her second husband be joined for conformity, but his dealing after the marriage with the property which she had so appropriated would

furnish evidence to charge him in a like character, jointly with her, as well as for form's sake arising from their marital relation. The older authorities seem to establish this conclusion. Trover will lie against husband and wife though the conversion were by the act of the wife only, or if by her before marriage—*Cox v. Crapnel* (Cro. El. 883); *Draper v. Fulkes* (Yelv. 165); *Marshe's case* (1 Leon. 312); Com. Dig. Baron and Feme, Y.; and see *Keyworth v. Hill* (3 B. & Al. 685).

A distinction is taken between an action of replevin in the *detinuit*, which is the form where the plaintiff has had his goods redelivered to him, and an action in the *detinet*, where the goods have not been redelivered, but the wrong doer remains in possession. The latter form of action has, it is said, fallen into disuse in England, but under our Statute there is sufficient authority for maintaining it. The present declaration appears framed to meet both cases—that of the actual replevy of some goods, which therefore the defendants no longer detained, and those which the Sheriff could not find, though they were proved to have been in the defendants' possession.

Upon these considerations we are of opinion that the defendants fail as to the first objection taken in the rule.

The second alleged misdirection is, the telling the jury that as to any property obtained by the defendant Daniel from his wife before the issuing of the writ, and which was in his hands at the time of issuing the writ, and which was not replevied, damages were recoverable. The substance of this objection seems to be an assertion that damages would not be recoverable unless for the detention of such goods as were absolutely replevied.

We have looked at numerous authorities, and it appears to us they establish a contrary conclusion. In replevin in the *detinet* the plaintiff may recover the value of the goods as damages for the *reprise*, but in the *detinuit*, where the implication is that the plaintiff has got his goods back, he can only recover damages for the taking.

It is true that when the Sheriff cannot find the goods, and

he returns that they are eloigned, the plaintiff may have a *capias in withernam*, a writ to take the defendant's goods, by way of reprisal, for the goods eloigned. But this was not the only remedy, for the plaintiff may proceed in the suit of replevin and recover damages to the value as well as for the detention: *Fitzh. N. B. 69 L.*; *Roscoe on Real Actions*, 626, citing *Wilkinson on Replevin*, 20. And where issue was joined on the property in a replevin suit, and it was found for the plaintiff, entire damages were assessed, and not the taking and the value of the cattle separate: for the judgment upon that (issue) is absolute, not conditional, and if the plaintiff had the cattle the defendant might give the same in evidence to the jury, and then they would have assessed damages only for the taking; and in *Gilbert's Distress and Replevin* (p. 145), this law is thus stated:—

“But when the Sheriff does not replevy the beasts, there you must recite the writ in the *detinet*, and count in the *detinet* also, because the beasts are not delivered; and there you recover as well the value of the beasts in damages, as damages for the detention.”

On the issue that the defendants did not, nor do, nor did, nor does either of them detain, we think there was evidence to go to the jury; on the issue as to the property the evidence was wholly in the plaintiff's favour. Finding for the plaintiff on all three issues, we think they were rightly directed as to the damages.

It was suggested, as against this view, that the widow might have paid funeral expenses and debts of the intestate. If this had been proved, we incline to think that an allowance might have been made in mitigation of damages. See *McCarthy v. Donovan* (13 Ir. Com. L. Rep. 195), citing *Williams on Executors*, 634, 236, (5th Ed.); *Allen v. Dundas* (3 T. R. 125); *Parker v. Kett* (1 Ld. Raym. 658). The point, however, does not arise.

Having adopted these conclusions on the points of law detailed, we need only add that we see no ground for dissenting from the jury on their view of the questions of fact. As to excessive damages, though the amount seems large, it is

within the boast of the husband, or the more self-possessed assertions of the wife. We can feel no surprise at nor see any wrong by a finding which, if it could be enforced, would apparently not make the defendants restore the full amount of their wholesale plunder of the intestate's effects.

We think the rule should be discharged.

Rule discharged.

LODGE V. THOMPSON.

Commission to examine witnesses.

A commission to examine witnesses was addressed to Samuel B. Henry and William J. Gibson, of Philadelphia, jointly and severally. Gibson took no part in executing it, but all was done by one Samuel B. Huey, and an affidavit of the plaintiff's counsel at Philadelphia, taken before Gibson, explained that Huey was the name forwarded by him to the plaintiffs' attorney here, but through some clerical error it was directed to Henry: that he knew no such person as Samuel B. Henry in Philadelphia, but that the Huey before whom the depositions were taken was the person intended.

This objection was not taken to the commission at the trial, though others were, and the evidence of witnesses on both sides taken under it was read.

Held, Hagarty, J., dissenting, that nevertheless the objection was fatal, for the depositions being taken without authority were not in fact depositions, and the execution of the commission was a nullity.

Per Draper, C.J.—It will be very desirable to adopt the suggestion in *Grill v. General Iron Screw Collier Company*, L. R. 1 C. P. 600, and to leave all merely technical objections to be taken advantage of by motion in Chambers, giving effect at *Nisi Prius* only to the absence of what our Statute makes conditions precedent to the use of the depositions.

COMMON COUNTS—*Pleas*, 1. Never indebted. 2. Payment.
3. Set-off.

The trial took place in March last, at Hamilton, before Hagarty, J.

The evidence for the plaintiff was taken upon a commission, tested 18th February, 1867, issued out of this court, and addressed to Samuel B. Henry and William J. Gibson, both of the city of Philadelphia, in the state of Pennsylvania, in the United States of America, Esquires.

Objections were taken to the admission of the evidence

taken upon the commission, and leave was reserved to move the Court to enter a nonsuit upon them, and the plaintiff had a verdict.

M. O'Reilly, Q. C., obtained a rule calling upon the plaintiff to shew cause why a nonsuit should not be entered, on the grounds: 1. That there was no legal evidence to sustain the verdict. 2. That there was no return to the commission under which the alleged evidence purported to be taken. 3. That the commissioner or commissioners appointed by the commission were not, nor was either of them, duly sworn before any one competent to administer the oath before proceeding to take the evidence. 4. That there was no one duly authorized to administer the oath, and that there was no affidavit sworn before any one authorized by law to administer it, of the due taking of the examination of witnesses under the commission, nor was there any sufficient affidavit of the taking of the evidence and of the executing of the commission; and said commission was not executed by the commissioners therein named, or either of them.

Burton, Q. C., shewed cause, citing *Frank v. Carson*, 15 C. P. 152; *Beach v. Odell*, 4 O. S. 8; *Nicol v. Alison*, 11 Q. B. 1006; *McLeod v. Torrance*, 3 U. C. R. 147; *Farrel v. Stephens*, 17 U. C. R. 250; *Grill v. The General Iron Screw Collier Company*, L. R. 1 C. P. 600; *Hawkins v. Baldwin*, 20 L. J. N. S., 198. Q. B.

O'Reilly Q. C., contra, cited *Hibbert v. Johnston*, 6 O. S. 635.

The facts of the case are fully stated in the judgment of the Chief Justice.

DRAPER C. J.—The first objection depends upon those which follow. If it was legally competent to the Court to receive and submit the evidence to the jury, it was not denied that it went far enough to sustain the verdict.

The commission is addressed to Samuel B. Henry and William J. Gibson. The authority is given to them jointly and severally. Gibson took no part in examining any witness

or taking any evidence in the cause, owing, as he states in his affidavit, to severe illness. All the interrogatories and cross interrogatories, as well as the commission itself, named Samuel B. *Henry* as the other commissioner, and the authority was exercised, the interrogatories were put, and the answers taken by Samuel B. *Huey*; and the explanation is given by the affidavit of Theodore D. Rand, (admitting that this affidavit was one which Mr. Gibson, the other commissioner, could administer), who describes himself as counsel for the plaintiff, and in an affidavit sworn before the said William J. Gibson, states that he forwarded to the plaintiff's counsel in Hamilton the names of two gentlemen to act as commissioners, and named Samuel B. *Huey* and William J. Gibson: that through some clerical error the commission was directed to Samuel B. *Henry* and William J. Gibson: that he knows no such person as Samuel B. *Henry*, but knows that the Samuel B. *Huey*, before whom the depositions were taken, is the individual intended to be nominated in the said commission.

Mr. Huey must have discovered that the commission was not addressed to him, and Mr. Rand, the plaintiff's counsel, who had nominated Mr. Huey, cannot he presumed not to have become aware of the error almost as soon as Mr. Huey. Though cross interrogatories were filed, it does not appear that the defendant was represented in Philadelphia, and in the heading of his cross interrogatories Samuel B. Henry is named as one of the commissioners. The last objection taken in the rule is shewn to be true by the fact of the misnomer. The misnomer itself is not referred to as having been objected to at the trial, nor that I noticed in the argument, but the fact does, as it seems to me, range within the objection that the commissioner or commissioners *appointed by the commission* were not nor was either of them duly sworn before any one, &c. Now Samuel B. *Henry* was appointed by the commission, and was not sworn, and Samuel B. *Huey* was not appointed by the commission, and yet he administered the oath to his co-commissioner, and having taken the oath before Mr. Gibson, took the evidence by himself.

It seems to me impossible to uphold this proceeding. It may be urged that the evidence was read at the trial, and this objection was not taken, although others were, and that among the depositions read were those of two persons called on behalf of the defendant: that conceding that those depositions could not have been used if the objection had been taken at the trial, it now comes too late; the evidence has gone to the jury, both plaintiff and defendant being represented by counsel at the trial, and the depositions should now be considered as written statements of evidence left by mutual consent to the consideration of the Jury—in short, that the objection was waived, because it was not taken, and the defendant took his chance of getting a verdict.

But I think it apparent that the objection was overlooked, not designedly withheld, and that the defendant's counsel did not advisedly or even knowingly abstain from urging it.

On the other hand, the plaintiff must be dealt with as cognizant of it, for the counsel who on his part attended the execution of the commission at Philadelphia, knew of the error in the name of one of the commissioners before the commission was acted on.

There is no affidavit from any one who acted on the plaintiff's behalf in obtaining the commission, to shew that the commission was addressed to Samuel B. Henry, by a "clerical error," and that they intended it should be otherwise addressed, and be executed by Samuel B. Huey. It is not even sworn that the plaintiff or his attorney were ignorant of the objection at the trial, and there appears to me no reason whatever for inferring that the defendant knowing the fact consented to the use of the depositions. The plaintiff can put it no higher than that the defendant, by not taking the objection, waived it.

If it were a mere irregularity it might be waived, but if the execution of the commission was wholly null and void, it will not become effectual because the objection was not taken. When an irregularity is spoken of, it almost invariably includes the idea of something that may be amended, if it becomes necessary. If that be a test, it is adverse to

the plaintiff. Suppose an ordinary commission for taking affidavits intended for Samuel B. *Huey*, issued in the name of Samuel B. *Henry*, can it be doubted that Huey would derive no authority under it; and if he administered affidavits with knowledge of the mistake, might it not be declared a contempt?

The objection stated in its simplest form is, that it was executed by another person than he to whom it was addressed. Whatever the instructions as to the issuing the commission, the agent who obtained it meant to have it in the form in which it issued. It may be true there is no such person as Samuel B. Henry in Philadelphia, but that fact and the error in using that name will not make it a commission to Samuel B. Huey. Hence it has never been executed. I cannot but presume Mr. Huey read the commission and the headings to the interrogatories, and must thus at least have discovered the error; but if he omitted to do so, it does not help the plaintiff.

There is a recent case of *Grill v. The General Iron Screw Collier Company* (L. R. 1 C. P. 600), in which an objection, though not of a similar nature, was taken at the trial, and afterwards in Banc, to the execution of a commission to examine. The objections were, that one witness named in the commission was not examined, and that interrogatories and cross interrogatories were not exhibited, but the witnesses were examined *vivâ voce*. Willes, J., said he "should much regret if it were true, that an objection going *only to the regularity of the proceedings* and not the merits, could be taken advantage of to obtain a new trial." He intimated a doubt whether an application should not be made at Chambers to set aside the depositions; and Montague Smith, J., observed: "The Lord Chief Justice could not have refused to receive them" (the depositions) "*unless they were taken without authority.*"

I think it will be very desirable to adopt the suggestion, and to repel all merely technical objections to the execution of a commission, giving effect only to those the non-existence of which our Statute makes, as it were, conditions precedent

to the use of the depositions, among which must, I apprehend, be included that they were taken and certified by the persons to whom the commission is addressed.

Being of opinion that the objection is that these depositions were taken without authority, were not in fact *depositions*, I think the rule should be made absolute, unless the plaintiff prefers to take a new trial on payment of costs, and takes out such latter rule within a month.

HAGARTY, J.—I regret there should be any difference of opinion on a question like this. The objection now held fatal was not taken at *nisi prius*, although among the papers attached to the commission was a full explanation of the discrepancy in the name, and many other objections were taken. It is mentioned for the first time in term. The defendant examined witnesses before the commissioner, used their testimony at the trial, and went to the jury on all the evidence.

I think we should confine the defendant to his objections taken at the trial. There is no pretence of anything being done in bad faith. The defendant availed himself of the commission to have his own witnesses residing abroad examined, and was willing, no doubt, to have had a verdict on their testimony.

I am strongly of opinion that the defendant after having so acted has no right, in the absence of any allegation of a wrong being done, to avail himself of an objection taken for the first time after verdict.

MORRISON J., concurred with the Chief Justice.

Rule absolute. (a)

(a) See *Hodges v. Cobb*, L. R. 2 Q. B. 652.

THE COMMERCIAL BANK OF CANADA v. HARRIS ET AL.

Banks—Usury—29-30 Vic., ch., 10 sec. 5.

Held, Morrison, J., dissenting, that the 29-30 Vic., ch. 10, sec. 5, has not a retrospective operation, so as to enable a Bank to recover upon usurious notes given before it was passed.

DECLARATION on four promissory notes made by the defendant W. R. Harris, under the name of Harris, Evans & Co., payable to defendant T. D. Harris, and endorsed by him to the plaintiffs.

Each of the defendants pleaded, that before the making of the notes declared on, and before the Statute 29-30 Vic., ch. 10, there was a corrupt agreement between the plaintiffs and the defendants for the loan of \$16,000, and that the plaintiffs should forbear and give day of payment for the same, and that for such forbearance the defendants should pay to the plaintiffs seven per cent., and twenty-five cents for every hundred dollars under colour and pretence of commission: that in pursuance of such agreement, the plaintiffs did advance to the defendants the said sum, and that afterwards, and before the making of the notes, and before the said Statute, the defendants, at the instance of the plaintiffs, drew and gave to the plaintiffs a number of cheques for sums amounting in the whole to more than \$16,000, for the express purpose of enabling the plaintiffs to take more than seven per cent. for the forbearance, and the plaintiffs did corruptly take more, &c. And that after all the foregoing facts there was in arrear to the plaintiffs, on account of the said loan and the said illegal interest, to wit, \$10,100, on account of which said sum, being the arrears of the said loan and of the illegal interest reserved as aforesaid, the defendant W. R. H. made, and the defendant T. D. H. indorsed, the said promissory notes declared upon, and the plaintiffs received the said notes corruptly, and contrary to the statute in such case made and provided.

Demurrer, because since the act 29-30 Vic., ch. 10, was passed, no Bank is liable to any loss for usury under sec. 9

of chap. 58, Consol. Stat. C., and that all objections to contracts on that ground have been removed, not only with reference to future, but also to past transactions.

Crooks, Q. C., for the demurrer, cited *Commercial Bank v. Cotton, et al.*, 17 C. P. 214, S. C. in Appeal, *Ib.* 447; *Bank of Montreal v. Scott*, *Ib.* 358; *The Queen v. Leeds and Bradford R. W. Co.*, 18 Q. B. 343; *Fowler v. Chat-terton*, 6 Bing. 258; *Flight v. Reed*, 1 H. & C. 703; *Broom Leg. Max.* 33.

K. McKenzie, Q. C., contra, cited *Moon v. Durden*, 2 Ex. 22; *Couch q. t. v. Jeffries*, 4 Burr. 2461; *Gillmore v. Executor of Shooter*, 2 Mod. 310.

DRAPER, C. J.—Neither in the report of *The Commercial Bank v. Cotton*, (17 C. P. 214), nor in the report of the same case in Error and Appeal (*Id.* 447), does it appear whether the note sued upon was made after the passing of the 29–30 Vic., ch. 10, (15th August, 1866). I presume it was, because in the judgment of the Court of Common Pleas, in *The Bank of Montreal v. Scott*, (17 C. P. 358, at p. 363). I find the following language: “Our opinion is that the defence of usury, which the defendants had pleaded, and which the jury had found against the plaintiffs before the passing of this Statute, *has not been in any way affected by the passing of the Statute.*”

In the present case, the four notes declared upon were dishonored long before the introduction of the fifth section into the “Act to provide for the issue of Provincial notes,” a section which, as is justly pointed out in the judgment of the Court of Common Pleas, “has no relation whatever to the intituling, preamble, or general purport of the Act.” It might have been added, that it formed no part of the resolutions reported to and adopted by the Commons House of Assembly, on which leave was given to bring in the Bill, which subsequently matured into that Statute.

It has, however, been decided by the Court of Error and Appeal, that this fifth section not only relieved Banks from

"forfeiting and losing," for the offence of usury, treble the amount of the money lent, but operated as a repeal of so much of the previous law as made bills and promissory notes (among other securities), whereon and whereby a greater interest than seven per cent. was reserved in the case of Banks, utterly void.

The present action is brought to extend, or rather to deduce from this decision the further conclusion, that bills and notes which had been under the former law utterly void when made and issued, and remained so at their maturity, were, I should not say restored to vitality, because they never had any, but endued with life, by relation to their date, under the influence of this enactment.

I am not prepared to accept this deduction, and if it be the logical consequence of the decision of the Court of Error and Appeal, I shall leave to that Court so to decide, for as at present advised such a construction would be at variance with the decision in the case of *The Bank of Montreal v. Scott*, and with the maxim "*Nova constitutio*," &c., which, as is noted in that case, is described by Pollock, C. B., as a "great constitutional principle."

For the law, which was only changed at so very recent a date, and which made all securities tainted with usury void, gave, in my opinion, a vested right to the makers of such securities to treat them as nugatory. They were founded on what was at the time an illegal act on the part of those who received them and advanced money for them, as well as on the part of the makers and borrowers of the money.

The case of *Flight v. Reed*, (1 H. & C. 703), only decides that a loan of money made under circumstances which, according to the law in force when it was made, prevented its constituting a legal debt, would furnish a good consideration for a new promise to repay such loan, when that law has been repealed. In giving judgment, Pollock, C. B., observed, "The altered law did not render valid the original bills; they were void when given, and remained void and of no legal obligation up to the time when they were renewed by the bills in question."

If the present defendants had made a note since the passing of the act founded on the previous loan, and being for no more than the principal and the legal rate of interest, it would come within the principle of *Flight v. Reed* and of other authorities therein referred to, but this suit is brought upon the original notes, which were void in their inception.

I think the defendants are entitled to judgment.

HAGARTY, J., concurred with the Chief Justice.

MORRISON, J.—In this case I am of opinion that the 5th section of 29–30 Vic., ch. 10, which enacts that no Bank shall, after the passing of the Act, be liable to any penalty or forfeiture for usury under the 9th section of Consol. Stat. C. ch. 58, is retrospective in its operation, and that our judgment should be for the plaintiffs.

I have looked into a great number of cases having a bearing on the question, and I quite concur in the remarks of Dr. Lushington, in giving judgment in the case of the *Ironsides* (31 L. J. Adm. Cas., 129), where he says, “It would be a useless expenditure of time to examine them particularly. They do not and cannot afford any clear guide to judge of the exceptions to the general principle. The construction must depend upon the words of the particular Statute itself to be construed, and the special nature of the case.”

The language of this isolated section, with nothing in any other section of the act to direct us to the intention of the Legislature, is not very well chosen. Its effect was considered in another case, and the construction to be given to it raised a question of considerable difficulty. I refer to the case of *These same Plaintiffs v. Cotton, et al*, in Appeal (17 C. P. 447) and to the wide difference of opinion that existed among the learned Judges who delivered judgments. In construing our Statutes we must keep in mind that, by the Interpretation Act, all Acts are deemed remedial, and, in the words of the Statute, “shall accordingly receive such fair, large and liberal construction and inter-

pretation as will best insure the attainment of the object of the Act and of such provision or enactment, according to their true intent, meaning and spirit."—Consol. Stat. C., ch. 5, sec. 6, subsec. 28.

The judgment of the Court of Appeal, in the case cited, decides in effect the result of the operation of this fifth section to be that, while a Bank is restricted to the taking of seven per cent. by law, it incurs no loss, penalty, or forfeiture, by taking or contracting for a greater rate of interest—in other words, that the laws against usury, so far as Banks are concerned, are repealed. That being the judicial construction put upon the section, the words used are in my judgment wide enough to, and do, embrace, and are applicable to past transactions, and to what were deemed usurious acts before the passing of the 29–30 Vic; and such I think must have been in the contemplation of the framers of the section.

The language, in my opinion, affords a key to the object of the Legislature. Strictly speaking, the words "any penalty or forfeiture for usury," &c., can only refer to the result of usurious transactions under the ninth section, and to which a Bank was liable at the time of the passing of the 29–30 Vic. After its passage, the ninth section was repealed, and no penalty or forfeiture for usury could arise under it.

It may be said that, from the use of such words, the section was construed to effect a repeal, yet I think it also indicates that the intention and object of the Legislature was also to comprehend within its meaning past transactions.

If the Legislature had intended merely to withdraw Banks from the operation of the ninth section in the future, and not to interfere with past transactions, it is only reasonable to suppose it would have indicated such an intention by qualifying or restrictive language—by something similar to that contained in the English Act (17 & 18 Vic., chap. 90), which repealed all existing laws against usury. That Act declared that nothing in it should prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the passing of the Statute.

On the whole, my opinion is that the Legislature intended that, after the passing of the 29-30 Vic., for any act previously done by a Bank in contravention of the ninth section of ch. 58, Consol. Stat. C., it should suffer no loss or be liable to any penalty or forfeiture; that the latter section should not be invoked, as in the present case, to prevent the plaintiffs recovering moneys which, but for that section, they would have been entitled to recover; placing the money transactions of Banks on the same footing and subject to the same rules as if the ninth section had never been enacted.

In arriving at this conclusion, I was not pressed by the considerations that influenced the Courts in many of the decided cases. This is not a case of injustice or of invalidating or defeating contracts, or of interference with vested rights, although on the argument the case for the defendants was put on the latter ground; but, as said by a learned Judge, "I cannot conceive that a claim not to make good a breach of contract—to commit injustice with impunity, can be truly denominated a vested right." Per Dr. Lushington, In re *The Ironsides* (31 L. J. Adm. Cas. 129.)

I see no public policy invaded, nor any infringement of the principle, "*Nova constitutio futuris*," &c., by our giving to the section a construction which I think is in keeping with the spirit and object of the Legislature. As said by Pollock, C. B., in *Flight v. Reed* (1 H. & C. 715), "No facility should be given to escape from an obligation to repay a real advance of money, or evade a contract willingly made, though interest should have been contracted for which used to be at a rate called usurious."

As to the case of *The Bank of Montreal v. Scott* (17 C. P. 358), that was an action brought before the passing of the Act 29-30 Vic., to which the defendant pleaded usury. The issue was tried, and the jury found against the plaintiffs under the law as it then stood; and, as I take it, only decides that the defence, under those circumstances, was not affected by the passage of the Statute.

Our judgment, in my opinion, should be for the plaintiffs.

Judgment for Defendants.

STOVIN V. DEAN.

Agreement—Construction—Independent covenants—Equitable plea.

Declaration on a deed, by which, in consideration of \$1, the defendant assigned to the plaintiff one-fourth share in an invention, for which he was applying for a patent in the United States, and covenanted to assign to him the same share in such letters patent to be issued; in consideration whereof the defendant covenanted to use his best endeavours to bring said patent into general use in the United States. Breach, that after the patent had been obtained, the defendant would not assign to the plaintiff, but wrongfully sold his whole interest to others.

Plea, on equitable grounds, that the real consideration, as the plaintiff well knew, was not the \$1, but the plaintiff's covenant to endeavour to bring the patent into use in the United States: that the plaintiff wholly neglected to use any exertion for that purpose, but, on the contrary, did, before the sale by the defendant of his right, undervalue and speak against the invention, and refused to allow it to be used in a railway of which he was manager; that the defendant was induced to enter into the agreement solely on account of the the plaintiff's position and ability to serve the defendant by his recommendations; and his conduct as aforesaid had been very prejudicial to the invention. And so the defendant said, that before any breach on the defendant's part, and before any sale by him, the plaintiff withdrew from and broke his agreement, whereby the consideration for the defendant's agreement wholly failed.

Hed, on demurrer, no defence, for the two covenants were independent; the plaintiff was entitled to a transfer as soon as the patent issued, and the non-performance by him of something to be done afterwards could not defeat his right of action.

DECLARATION.—For that, by a certain indenture, sealed with the seal of the defendant, bearing date the 8th October, 1863, then made between the defendant of the one part and the plaintiff of the other part—reciting that the defendant had invented a machine for the more perfect combustion of fuel in the furnaces of locomotives, for which he was making application for letters patent of the United States of America, and that for the consideration thereafter mentioned he had agreed to sell all the right, title, and interest which he then had or might have in or to one share or fourth part in the said invention, in consequence of letters patent, therefor—it was by said agreement witnessed, that for and in consideration of one dollar to the said defendant in hand paid by the said plaintiff, the said defendant did assign and transfer to the said plaintiff the full and exclusive right to one share or fourth part of the said invention; and the said defendant did by the said indenture covenant with the said

plaintiff to assign and transfer to the plaintiff all his right, title and interest to one share or fourth part in said letters patent to be thereafter issued by the Government of the United States of America aforesaid, to hold to the said plaintiff, his executors, administrators, and assigns, for the full term for which the said letters patent might be entered; in consideration whereof, the said plaintiff did agree with the said defendant to use his best endeavours to bring said patent into general use in the United States aforesaid.

And the plaintiff says that the said Government of the United States of America did, after the making of the said agreement, and before the commencement of this suit, issue letters patent for the said invention to the said defendant; and all conditions were fulfilled, and all things happened, and all times elapsed necessary to enable the plaintiff to have the said covenant performed by the defendant on his part; yet the defendant, although after the granting of the said letters patent by the said Government of the United States, and before the commencement of this suit, he was requested so to do, did not nor would transfer or assign to the plaintiff his right, title and interest in one share or fourth part in the said patent, or any part thereof, but therein wholly failed and made default; and the plaintiff further saith that, although the said Government of the United States did issue the said patent for the said invention, yet the defendant, not regarding his covenant, after the making thereof, and before the commencement of this suit, wrongfully, and without the consent of the plaintiff, sold, assigned, and transferred unto certain persons in the said United States of America, whose names are unknown to the plaintiff, all his right, title and interest in the said patent—by means of which said several premises the plaintiff lost all the profits and advantages which he otherwise might and would have made and received from said patent and the use thereof, and hath otherwise been greatly damaged and injured.

Plea, on equitable grounds: that the said consideration of one dollar in the said indenture witnessed was merely a nominal and not real consideration for the defendant making

the said agreement and covenant in the said declaration mentioned, and that the true and real consideration for the defendant agreeing to assign and transfer to the said plaintiff all his right, title and interest to one-fourth part in the said letters patent, was the agreement of the plaintiff, in the said indenture and declaration set forth, to use his best endeavours to bring the said patent into general use in the United States, as the plaintiff well knew. And the defendant avers that the plaintiff has wholly neglected and refused to use his best endeavours, or any endeavour or exertion whatever, to bring the said patent into general use in the United States, but, on the contrary thereof, did before the sale by the defendant of his right to the said patent, undervalue and speak against the said invention, and refused to permit or allow the same to be used on the Welland Railway, of which the plaintiff was manager, and of which the defendant was locomotive superintendent, at the time the said agreement was made; and the defendant was induced to enter into the said agreement with the plaintiff solely on account of the plaintiff's position and ability to serve the defendant by his recommendation of the said invention and patent, and from no other cause; and the conduct of the plaintiff in undervaluing and running down the said invention was very prejudicial to the defendant, and prevented him from realizing great gains and profits on account of his said invention, by reason of his having so run down and undervalued the said invention. And so the defendant in fact saith, that before any breach of the said agreement on his part, and before the sale of the said patent, the plaintiff withdrew from and broke the said agreement on his part, whereby the consideration for the defendant's entering into the said agreement wholly failed, and the plaintiff ought not in equity and good conscience to be allowed to claim any interest in the said invention or patent, or in the proceeds of any sale thereof.

Demurrer and Joinder.

W. Eccles, for the demurrer, cited *Drewry* on Injunctions, 72; *Leeds v. Cheetham*, 1 Sim. 148; *Mines Royal Societies v. Magnay*, 18 Jur. 1028.

M. C. Cameron, Q. C., contra, cited Wood v. Dwarrris, 11 Ex. 493; Reis v. Scottish Equitable Life Assurance Co. 2 H. & N. 19; Wheelton v. Hardisty, 8 E. & B. 232; B. & L. Prec. 488.

HAGARTY, J, delivered the judgment of the Court.

The plea avers that the plaintiff's covenant to use his best endeavours to bring the patent into general use in the United States was the true consideration of the defendant's contract. The defendant could not possibly perform his agreement until after the letters patent had been obtained.

As soon as the patent was obtained we consider the plaintiff was entitled to require the transfer of the one-fourth part, and an action would have lain for refusal to assign on reasonable request. This would be substantially before the plaintiff could do much, if anything, to perform his part of the bargain; and so, if this defence be available, a complete cause of action would vest in the plaintiff before any breach by him of his agreement.

The covenants appear to be wholly independent of each other, and each party is liable to the other for damages for any breach. The equitable defence is simply this, that the defendant is released from assigning the stipulated share in the patent, by reason of the plaintiff's breach of his covenant to do something towards furthering the use of the invention after patent granted, the latter being something which in contemplation of the contracting parties would naturally have to be done subsequently to the plaintiff becoming the owner of the one-fourth share. It could hardly be expected that the plaintiff should be required to labour to spread the use of the patent unless or until he had acquired his stipulated share.

Therefore it seems to us that the covenants are wholly independent, and that the non-performance by the plaintiff of something he was to do after the patent had been obtained, can be no defence to a covenant to assign the one-fourth share, which the plaintiff might have required as soon as the patent was obtained. Otherwise the defendant would prac-

tically have the right to refuse to perform his contract to assign until he saw whether the plaintiff would or would not perform his agreement to endeavor to extend its use in the United States.

The defendant seeks to offset the plaintiff's breach of one independent covenant against his own breach of another. There was really no connection between the two things. It is not suggested why full satisfaction cannot be obtained from the plaintiff in damages for his subsequent breach of contract.

This is not a case of any mistake in the terms of the contract, or of bad faith in either contracting party when the contract was entered into. It is simply asking to be excused from performing a stipulated bargain because the other party had failed to perform some matters subsequent.

We cannot understand why any different rule should prevail in equity to the rule of law in a case of breach of independent covenants like these. See *Drewry* on Injunctions, 72, and cases there cited.

If the true consideration for this bargain had been that the plaintiff covenanted twelve months after the issuing of the letters patent to pay £100, would the non-payment of this sum be a defence to an action for not assigning the one-fourth share, even if the action had not been brought till after the twelve months, and especially in the absence of any allegation that the plaintiff was unable to meet his engagements? We think not, and that both at law and in equity the defendant would be left to his cross action. The only difference here is, that the damages are not ascertained by the act of the parties, but must be estimated by a jury. We cannot see any difference in the principle.

We think the plaintiff should have judgment.

Judgment for plaintiff.

CUSHING V. McDONALD.

Statute of Limitations—C. S. U. C., ch. 88, sec. 3—Tax sale—Payments to wrong officer—3 Vic., ch. 46.

In ejectment the plaintiff claimed under a tax deed made in 1842, coming within the 3 Vic. ch. 46. Defendant proved a paper title from the patentees, and gave evidence of possession held from 1846, for more than twenty years before this action. The jury having found for the defendant, *Held*, without deciding the validity of the tax sale, that he had acquired a good title under the Statute of Limitations, against which the plaintiff was not protected by sec. 3 of Consol Stat. U. C. ch. 88.

Quære, as to the effect of 3 Vic. ch. 46, and of the payment of taxes made by the defendant to the wrong officer, as stated in the case.

EJECTMENT for lots 40 and 41 in the 8th concession of Osgoode, in the County of Carleton.

The case was tried before Adam Wilson, J., at Ottawa.

The defence was limited to the south half of the north half and the south half of lot 40, and to lot 41.

The plaintiff claimed by deed from one Perkins and wife to him. Sheriff Treadwell conveyed lot 40 to this plaintiff by deed, dated 22nd June, 1842, and conveyed lot 41 to Lyman Perkins by deed, dated 2nd November, 1842, and Perkins conveyed to the plaintiff by deed on the 27th May, 1853.

Defendant's paper title was clearly proved from the patentees, and he also claimed by length of possession.

Numerous objections were taken to the validity of the plaintiff's tax title.

It was proved that the Treasurer's warrant was ordered and issued, dated 20th September, 1836, and received by the Sheriff on the 27th of October, 1836, including these lots and others as eight years in arrear to the 1st of July, 1836. The lands were offered for sale on the 17th of April, 1839, at L'Original, at an upset price of 2s. 6d., and again on the 19th of June, 1839, when they were sold. To a warrant so acted upon objection was taken, which was sufficiently answered by reference to the statute 3 Vic. ch. 46, and the case decided thereon, as to lands in the same township, sold at the same time: *Hamilton v. McDonald*, 22 U. C. R. 136.

As to the advertisements directed by this Act, the Sheriff

produced a copy of an advertisement which he published, but no papers containing the advertisements were produced. He said it was in the official Gazette he thought, and as there was no paper published in the district, he thought he published it in the Bytown Gazette, and he thought also in a Cornwall paper. He said he did all that was correct: posted up throughout the district, and in every township, and distributed copies to individuals, having got 100 or 200 copies printed and distributed.

This mode of proof of the statutable advertisements was objected to, and leave given to move for a nonsuit thereon. General evidence was given as to no distress being on the lands.

The Treasurer proved there was nothing in his books to shew taxes paid for the time they were stated to be in arrear.

Leave was given to move for a nonsuit on the following objections taken to the plaintiff's case: 1. That the Sheriff sold for too much. 2. As to the warrant ceasing to exist before sale, (already noticed). 3. That the Statute 3 Vic., ch. 46, only confirms the sale as if 7 Wm., IV. ch. 19, had not been passed. 4. If this last Act does not apply, the sale should have been in the Township of Osgoode. 5. No legal evidence of publication. 6. That the lots were not mentioned in the Sheriff's notice filed, calling on parties to produce their receipts, and therefore the sale was invalid. 7. No evidence of advertisement under the warrant. 8. No evidence of search for distress.

For the defence, beside proof of paper title, it was sought to prove that taxes had been paid. A receipt in full for taxes on the two lots to the 1st of July, 1828, signed by A. Macdonald, Sheriff of Ottawa; another receipt for 10s. 10d., taxes on these lots, dated Cornwall, 26th April, 1833, signed D. Macdonell; and another with the same signature, dated Cornwall, 5th March, 1837, for £2 14s. were produced. The receipts both said, "To be paid to the Treasurer of the Ottawa district." Frats, one of the plaintiff's family, said he paid the money to McDonald, who he understood was Treasurer; he enquired for the Treasurer's office, and went

into it. Frats lived in the district in which he so paid the taxes. And again, there was a receipt proved of £4 9s. 4d. paid by Frats for taxes on these lots to the Treasurer of the Ottawa District, on the 26th May, 1842. The witness Henry Frats said he heard of the sale, and went to L'Original on the 26th of May, 1842, took all the tax receipts, went to Johnston, the Treasurer there, and shewed him the receipts. He said he did not know of the sale ; he made up the bill, and witness paid up and got receipt in full to the 1st January, 1842. He made up the account from his books ; witness told him he came to redeem the lands that he heard had been sold.

Evidence was given as to McDonald, the father of the defendant, clearing the land in 1846, and putting in a crop that fall, and possession was proved from thence onward. He said the land was not assessed on the collector's roll till 1846, and from that time he paid the taxes. In 1844 or 1846, a witness proved that he told the plaintiff a man claimed lot 40 ; he was not sure, but probably told him McDonald was the claimant, (as he knew he was). It was also proved that Perkins lived in Ottawa from 1840.

For the plaintiff it was proved, in reply, that the "D. Macdonell" signed to the receipts of 1833, and 1837, was in the handwriting of Donald Macdonell, who was Sheriff in 1833, but in 1837 the witness thought Mr. Martin was Sheriff ; he was not aware of any connection between him and the Treasurer. The Sheriff's office was kept in Cornwall, and the Treasurer's office was kept in his own house at St. Andrews, six miles from Cornwall.

Henry Frats, being recalled, said when he paid Macdonell in 1837, the latter said he was acting for the Treasurer of the Eastern District.

The learned Judge told the jury that there was no evidence of either plaintiff or Perkins having knowledge of possession having been taken more than twenty years before suit, holding that the proviso as to notice in the Statute applied equally to them as to ordinary patentees, but he left it to them to find as a fact, also, whether the taxes had been paid in 1833, to a properly authorised person. He said he

thought the payment was not properly made. The Treasurer's books had been burned in 1834, so that it could not now be shewn whether the Ottawa Treasurer ever got the taxes paid to the Eastern District Sheriff.

The jury found for the defendant.

S. Richards, Q. C., obtained a rule for a new trial on the law and evidence, and because the verdict was perverse and against the Judge's charge.

Spencer shewed cause, repeating the objections raised at the trial.

HAGARTY, J., delivered the judgment of the Court.

We are not surprised at the jury taking the view of the case most favourable to the true owners, who, from the earliest date, seems to have been anxiously endeavouring to pay, and as they thought actually paying the taxes, and as soon as they heard of the sale paying up all the arrears, as they thought, to the proper officer in 1842, prior to the date of the Sheriff's deed. The plaintiff and Perkins for twenty-four years made no attempt to enforce their title, during all which time the owners regularly paid the yearly taxes. It is conceded that the aid of Stat. 3 Vic., ch. 46 is required to support this sale under the circumstances. Then comes the proviso that the Sheriff shall immediately publish a list of all the lands so sold by him in the Upper Canada *Gazette*, and in at least one newspaper in the Eastern and Bathurst Districts, and also in not less than four public places, &c.; and it might be lawful for him, within two years after the date of such advertisements, to convey the lands sold to the respective purchasers.

There was evidence to go to the jury to support the defence of twenty years—the actual possession by McDonald, the patentee's vendee, commencing a little over twenty years before the commencement of the suit, and several years after the right of the plaintiff and of Perkins, through whom he claimed one of the lots, first accrued.

The learned Judge inclined to the opinion that the plain-

tiff was protected against the operation of the Statute of Limitations by the want of notice under the third section of ch. 88 Consol. Stat. U. C.

It says, "In the case of lands granted by the Crown of which the grantee, his heirs or assigns by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some portion thereof, *and in case some other person not claiming to hold under such grantee* has been in possession of such land, such possession having been taken while the land was in a state of nature, then unless it can be shewn that such grantee or such person claiming under him while entitled to the lands had knowledge of the same being in the actual possession of such other person, the lapse of twenty years shall not bar the right of such grantee or any person claiming under him to bring an action for the recovery of such land, but the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained."

We are of opinion that the clause cannot protect the plaintiff from the operation of the Statute. The case provided for is, where a person not claiming under the grantee takes possession of wild land without the knowledge of the grantee or those claiming under him. The case before us is just the opposite in its complexion. The grantee or his vendee was the person taking possession of his own estate. The person claiming the estate then and now, who is sought to be barred by the twenty years, is most certainly not "the grantee, his heirs or assigns, who had not taken actual possession," &c. &c. The patentee's vendee having a perfect paper title entered into actual possession, and has held it for twenty years after the right of entry now sought to be enforced first accrued to the plaintiff. Therefore it seems to us that the defendant is either now in possession of his estate by his paper title perfect against all the world, or if, as the plaintiff contends, his estate wholly ceased or was forfeited by the sale for taxes in 1842, and a new estate with a right of entry vested in the plaintiff in 1842, then the Statute of Limitations has barred that right of entry.

With this view of the law, and the jury having found, as we think rightly, for the defendant, we deem it unnecessary to discuss the many objections raised to the plaintiff's title. The curious provisions and wording of the Statute 3 Vic. ch. 46 would, we think, raise many questions for argument. Had this defendant lost his estate under the facts proved in the evidence of the constant attempts made in good faith to pay all taxes due thereon for the last forty years, it would be a most unfortunate result.

We think the verdict must stand, and the rule for new trial be discharged.

Rule discharged.

EARNSHAW V. TOMLINSON.

Evidence—Declarations.

In an interpleader to try the right to goods seized under execution against A. and B. and claimed by the plaintiff, C., a brother of B.—*Held*, that B's statement, while in possession of the property with the plaintiff's assent, that it belonged to his sister, could not be evidence, as against the plaintiff, to disprove the plaintiff's right.

INTERPLEADER, to try the right of property on a seizure by the Sheriff, at defendant's suit, against Jonathan and Eamer Earnshaw.

The case was tried at Toronto, before Adam Wilson, J., and a verdict was rendered for the defendant.

Eamer Earnshaw, a brother of the plaintiff, and an execution defendant, was examined, and was cross-examined as to the statements made by him as to the ownership of some of the property in question. He denied having said that as the execution plaintiff had a claim against him, he must say the property was his sister's, but asserted that he said they were his brother's, the plaintiff; he sold a mare, and took a note for the price in his own name. One Burn was called to contradict this witness, and swore that he told him that a

party in Markham had a claim against him, and he thought it better the property should go in his sister's name, but spoke of them only as his own.

The learned Judge told the jury that Eamer being in possession of property with the assent of the plaintiff, and making declarations that the property was the property of his sister, was (under the circumstances) evidence of such fact; that is, of the property being the property of his sister, and so not the property of this plaintiff.

The jury found for the defendant, the plaintiff's counsel objecting to this charge.

Robert A. Harrison obtained a rule for a new trial for this alleged misdirection.—He cited *Tay. Ev.* 4th Ed., secs. 539, 540, 541; *Fairlie v. Hastings*, 10 Ves. 123.

M. C. Cameron, Q.C., shewed cause.

HAGARTY, J., delivered the judgment of the Court.

It is to be regretted that any misunderstanding took place as to the true effect of the learned Judge's charge, as the verdict was otherwise quite warranted by the evidence.

It was of course competent for the defendant to contradict Eamer's statements, and the contradiction, if believed, proving that he, while in the possession of the property, asserted it to be not the plaintiff's, but his sister's, would operate, most probably, very strongly against his veracity with the jury.

But his declaration could not, in itself, be evidence of the fact that his sister owned them as against the plaintiff, however much it might affect his own credibility.

We fear a wrong impression was (most probably unintentionally) conveyed to the jury, as to the legal effect of the witness's statements, and it is impossible for us to measure the extent of its influence on the verdict; and we are therefore reluctantly obliged to direct a new trial without costs.

Rule absolute.

DELONG V. OLIVER.

Agreement to sell land—Default by vendee—Right to recover back deposit.

H., a lessee of certain land, assigned to defendant, who agreed to sell to the plaintiff for \$449, and received \$100 on account. The plaintiff leaving made default in his other payments, the defendant sold to one C., for \$349, stipulating with him that he should give the plaintiff a chance of redeeming the place for the same sum, which C. said the plaintiff agreed but failed to do.

Held, following *Campbell v. Grier*, 10 C. P. 295, that the plaintiff could not receive back the \$100 on the common counts, for the agreement having been abandoned through his inability to fulfil it, there could be no implied promise on defendant's part to refund the deposit.

COMMON money counts. *Plea*—Never indebted.

The case was tried before Adam Wilson, J., at Woodstock.

It appeared that a lease for years was made by the guardians of the owner in fee to Samuel Hillman in 1862. Shortly after Hillman assigned it to the defendant, and while the defendant was assignee it was proved, wholly from his admissions, that he had agreed to sell or had sold it to the plaintiff for \$449, of which the plaintiff had paid down \$100, and was to pay him \$100 more forthwith, but had made default in his payments: that the defendant had tried several times to get the money from the plaintiff. Alexander Cuthbert, the agent of the landlord, was pressing the defendant for the rent, and defendant was putting him off, on the ground of the plaintiff's default. The defendant then, on the 19th of November, 1864, by deed, assigned the term to Cuthbert, for \$349.

Cuthbert swore that defendant bargained with him that he was to give the plaintiff a chance to redeem the place on paying the same money. Cuthbert said he offered it to the plaintiff for the same money, and the plaintiff agreed to redeem, but did not do so.

A nonsuit was moved for, and granted, leave being reserved to the plaintiff to move to enter a verdict for him.

In Michaelmas term, *D. G. Miller* obtained a Rule Nisi accordingly, and in this term *Read*, Q.C., shewed cause,

citing *Campbell v. Grier*, 10 C. P. 295 ; Sug. V. and P., 14th Ed., p. 40.

HAGARTY, J., delivered the judgment of the Court.

The learned Judge at the trial laid some stress upon the fact that defendant assigned to Cuthbert subject to the plaintiff's right, so that his bargain was really not determined.

The case is, we think, governed by that in our own Court of Common Pleas, *Campbell v. Grier*. The then Chief Justice says: "The plaintiff is not entitled to recover on the common counts. The facts distinctly shew that the abandonment of the agreement arose from the plaintiff's inability to fulfil it, and no implied promise on the defendant's part to refund the deposit could arise on such a ground, any more than if the plaintiff had directly refused to fulfil his engagement. The defendant seemed to have been willing to complete the sale, and the plaintiff was unable to complete the purchase." He refers to *Healey v. Bongard* (1 C. P. 212), *Hoskins v. Mitcheson* (14 U. C. R. 551). This case of *Campbell v. Grier*, after a second trial, is again reported in 11 C. P. 234, and the same view of the law repeated. Sug. V. and P. 14th Ed. 40, seems to adopt the same view.

We think the case of *Campbell v. Grier* binds us until reversed in error.

Rule discharged.

BARR V. THE CANADA LIFE ASSURANCE COMPANY.

Boundary Line Commissioners—Evidence and effect of their proceedings.

The point in dispute being the boundaries of the N.E. quarter of lot 21, it was sworn that there were no original posts between 20 and 21, nor at lot 19; and the plaintiff then offered to prove that a requisition had been made to the Boundary Line Commissioners, to settle the line between 19 and 20, by the parties interested therein, and that they did so and planted monuments; but as no award had been filed, and no record of the proceedings could be found, he relied upon oral testimony only, and upon acts and work on the ground.

Held, inadmissible; for 1. There was nothing to shew that the documents required had ever been drawn up, so as to let in the secondary evidence; 2. The owner of 21, not being necessarily interested, would not be bound by the award, unless a party to the proceedings, of which no proof was offered; and, 3. Posts between 19 and 20, if planted by the Commissioners, would not be equivalent to original posts, by which the site of the lost monument, shewing the boundary of 21, could be determined.

The omission to file the award, if the evidence had been in other respects sufficient, would not have been fatal.

DECLARATION on a covenant that defendants had right to convey to the plaintiff the north-west quarter of lot number twenty, and the north-east quarter of lot number twenty-one, in the second concession of the township of East Oxford, in fee simple absolute. Breach, as to the north-east quarter of number 21, that one Newton Perry had lawful right and title to ten acres thereof, and afterwards granted the same to one William Peers, who entered upon the plaintiff and expelled him, and still keeps him out, and who brought an action of trespass against the plaintiff for entry upon the same, and the said defendant had notice to defend, and refused, whereby &c.

Plea.—That Newton Perry had not, at the time of making the said indenture, lawful right or title to any part of the north-east quarter of number twenty-one, nor did he grant the same to the said William Peers. Issue.

The trial took place at Woodstock, in April last, before Morrison, J.

The point in dispute between the parties turned upon the proving what were the true boundaries of the N.E. quarter of number twenty-one, in order to establish that

Newton Perry had title to a part of the land conveyed by defendants to the plaintiff.

It was admitted that one Hamlin became entitled to the whole of number twenty-one by conveyance from the grantee of the Crown, and that Hamlin, by deed, dated 21st January, 1834, conveyed to Newton Perry one hundred acres, more or less, of this lot, being the north end thereof, and described by metes and bounds, commencing at the north-east angle of the lot: that Perry, by deed dated 29th December, 1862, conveyed to Schriber fifty acres, being the east part of the north end of the lot, the description commencing at the N.E. angle of the lot, and following the description in the preceding deed in course and distance, *i. e.* S. 15° , $40''$ E., 33 c., 70 l., but only going part of the distance, *i. e.* 14 c., 90 links, on the second course of S. 78° , $30''$ W. These fifty acres became vested in one Carroll in fee, and he mortgaged the N.E. quarter of the lot to one Ball, on the 23rd March, 1857. On the 24th August following, Ball duly assigned this mortgage to the defendants, who conveyed to the plaintiff the N.W. quarter of number 20, and the N.E. quarter of number 21, &c.

Then the plaintiff called a witness, who had formerly owned the north-east quarter of number 20, and who proved that there were no original monuments to be found between numbers 20 and 21, nor at number 19. The plaintiff then proposed to prove that a requisition had been made to the Boundary Line Commissioners to settle the boundary line between numbers 19 and 20, by the parties interested therein; that the commissioners did so, and planted monuments; but that no award was filed, according to the statute, nor was any record to be found of the proceedings; and he proposed to prove by oral testimony that such proceedings were had, and such boundary was settled, and by acts and work on the ground that it was so settled by the commissioners, without producing any documents or papers.

The learned Judge ruled this evidence was not admissible, and the plaintiff's counsel stating that he had no other mode of proving the boundaries of the land in question, to

enable him to shew want of title in the defendants, submitted to a non-suit.

Freeman, Q.C., obtained a rule calling upon the defendants to shew cause why the non-suit should not be set aside, the learned Judge having improperly ruled that no evidence of a survey made and monuments placed by the Boundary Line Commissioners could be received unless their report or award had been duly filed. He cited *Regina v. Rose*, 12 U. C. R., 639; *Raile v. Cronson*, 9 C. P. 1, 13.

M. C. Cameron, Q.C., shewed cause, citing *Havens v. Donaldson*, 1 U. C. R. 371; *Vivian v. Campbell*, 7 C. P., 175.

DRAPER, C. J., delivered the judgment of the Court.

If no other ground had existed upon which the plaintiff was non-suited but that stated in the rule, we must in deference to decided cases have made the rule absolute, for it has been more than once held that the statutes are only directory in regard to the filing of the award.

But the learned Judge's report of the case shews that there was much more involved than the mere question that the award or judgment of the commissioners was not filed, It was proposed to prove by merely oral testimony that the commissioners had been called upon to act. No paper or document of any kind was produced, and beyond the fact that no such documents were filed where the law required no account of them was given, no evidence that they ever were drawn up. That secondary evidence of lost documents may be given, no one doubts; but that proposition involves the assertion that they once existed. Acts and work on the ground, which the plaintiff proposed to prove, would not establish the award or judgment which recorded those acts, or shew that any such award or judgment was ever drawn up; and if it all rested in parol, and in acts and work on the ground, it would not be what the statutes required.

But underlying all this is another, and as appears to us unanswerable objection. The evidence, if received, and if

it fulfilled the hope of the plaintiff's counsel, related wholly to a boundary between lots numbers nineteen and twenty, and to a monument planted to establish that boundary.

Now, whether we assume, for it no where distinctly appears, that number nineteen was to the east or west of number twenty-one, we may certainly assume that number twenty separated these two lots, and that in a dispute as to the boundary line between nineteen and twenty, the owners of number twenty-one were not necessarily interested; and unless they were parties to the requisition, the award (however well proved) would not bind them or any one claiming by, through, or under them. It would be *res inter alios acta*. No evidence whatever was offered to connect the then owners of number twenty-one with this proceeding before the commissioners.

Further, if it were clearly proved that the commissioners did in fact plant a monument to mark the boundary between lots numbers nineteen and twenty, and to regulate the side-line between those lots, no statute gives to the acts of the commissioners any binding effect except as to the parties who are before them, nor does it make posts planted by them equivalent to posts planted at the original survey, so that they can be made use of to ascertain and determine the site of other monuments that are lost, in the manner provided by the Surveyors' Act.

For these reasons we think the rule to set aside the non-suit should be discharged.

Rule discharged.

GREEN ET. AL. V. LEWIS.

Contract made in Chicago—Conflict of laws—Statute of Frauds—Agency.

A contract for the sale of goods to the plaintiffs at a certain price, payable in Toronto, was made by the defendant at Chicago, through his agent there, the goods to be shipped by the Grand Trunk Railway from Toronto. No sold note was signed by the broker until after action brought for the non-delivery; but it was proved that the 17th Section of the Statute of Frauds was not in force in Illinois. *Held*, that the contract, being valid where it was made, could be enforced here, though not in writing.

Held, also, that the evidence, stated below, sufficiently proved the agent's authority to act for the defendant.

THE declaration stated that on the 1st of September, 1865, the defendant bargained and sold to the plaintiffs, and the plaintiffs bought of him 100 barrels of raw linseed oil, equal to 4,000 gallons, at 77½c. per gallon, payable in gold, with no charges to be paid by the defendant in respect of package or cartage. Averment, that all conditions were fulfilled, &c.; that the plaintiffs have always been ready and willing to pay the price, yet defendant has not delivered the oil. *Plea*—Did not promise.

The case was tried at Toronto, in October last, before John Wilson, J.

All the evidence was taken in the United States upon a commission. The principal witness was Henry C. Colgate, a commercial broker and manufacturer's agent, as he described himself, residing and doing business in Chicago. The defendant carried on business at Toronto under the name of Rice Lewis & Son. Colgate knew him only by doing business with him. The first transaction was in April, 1865. On the 16th of August, 1865, he addressed a letter to the defendant, by the name of the firm, as follows: "Will you please inform me whether you have any English linseed oil, raw and boiled, on hand, and what are your figures for the same in gold. The market here is looking so that I think I can use some. Please reply at your earliest convenience."

Defendant wrote in reply, dated 18th of August: "Your's of the 16th before us. In reply would say we can furnish you with genuine raw at 77½c., and double boiled 82½c. per

gallon. No charge for package or cartage. We hope to get your orders, soliciting which we are, &c."

On the 22nd of August Colgate wrote to the defendant as follows. * * * "The price of your oil (raw) laid down here would be \$1.47 per gallon; the market price of same \$1.32 to \$1.35, and none to be had. I could sell 300 barrels to-day if it could be laid down here at those figures; if gold should fall, then I could make sales. The general impression here is that oil will go up from \$1.50 to \$1.75, as the seed crop is all destroyed by the late heavy rains. So soon as there is any margin to enable me to make sales I will do so. I suppose that at prices quoted you will allow me the regular commission of 50c. per barrel, on orders sent to you."

On the 1st of September, 1865, between, 11 a.m., and noon, Colgate sent from Chicago a telegram to the defendant:

"Ship S. Green & Co., Chicago, (100) one hundred barrels raw linseed oil, Grand Trunk, care of Michigan Southern. Price (77) seventy-seven and ($\frac{1}{2}$) one half cents, gold in Toronto. Can I sell (200) two hundred more, answer?"

Previous to sending this message, Colgate had sold to S. Green & Co. the plaintiffs, 100 barrels of raw linseed oil. He swore that he effected such sale on behalf and on account of the defendant at 77 $\frac{1}{2}$ c., gold; the oil to be delivered in Toronto free of all charges for cartage or package: that in effecting such sale he was acting for the defendant; when he agreed with the plaintiffs for the sale he was acting as broker for the defendant. He had not previous to the sale been notified by the defendant, or on his behalf, not to sell oil on his account at the rate mentioned in the letter of the 18th of August. He delivered, not on the date, but, as he stated, in pursuance of this sale, to the plaintiffs a note, as follows:

"Chicago, September 1st, 1865. Sold to Samuel Green & Co., on account of Messrs. Rice Lewis & Son, Toronto, C.W., one hundred (100) barrels of linseed oil, at seventy-seven and one-half ($\frac{1}{2}$) cents, gold, or Canada funds. No charge for cartage or package." On cross-examination he said he signed this on the 2nd of January, 1866: that he

should have signed it sooner, but he was absent from the city much of the time.

Colgate stated further, that between 2 and 3, p.m., of the 1st September, he received at his office a telegram as follows: "Americans here buying up seed and oil, price to-day eighty-seven and a half ($87\frac{1}{2}$) cents; will be higher to-morrow. Shall we ship—Rice Lewis & Son?": that between the 18th of August, 1865, and the 1st of September, between 2 and 3, p.m., he had not been notified by the defendant of any change in the price of oil, nor had the defendant between those dates withdrawn any authority given by him to Colgate to act as his broker in the sale of the oil: that between the 18th of August and the 1st of September, he sold to McCormick & Callender of Chicago, under the same authority, 100 barrels of raw linseed oil, at the same price and on the same terms; and at 10, a.m., of the 1st of September, he sold W. D. Harris & Co. 50 barrels of raw linseed oil, at the same price and on the same conditions: that the defendant shipped to McCormick & Callender 50 barrels on the order he (Colgate) had sent for 100 barrels, and on the 8th of September telegraphed they had done so, and would ship the remaining 50; but did not do so, nor did they fill the order to W. D. Harris & Co.

He proved a letter from defendant, dated Toronto, 1st September, 1865, stating that he should ship as directed the 100 barrels raw linseed oil, at $77\frac{1}{2}$ cents per gallon, and would forward invoice, &c., in the course of a mail or two: that in regard to an additional lot of 300 barrels he would write. He referred to the telegram stating the advance of ten cents per gallon "with prospect of further jump."

Colgate also wrote to defendant a letter dated 1st September, 1865, informing him of the sale to W. D. Harris & Co. that morning, before the receipt of defendant's telegram notifying the change in prices: that he had sold 250 barrels "yesterday and this A.M." in good faith, having received no notification of the change of price sent on the 18th of August, and that he looked to them to fill the orders.

On the 6th of September, 1865, the defendant wrote to

Colgate, stating that at that time there was little prospect of supplying more than McCormick & Callender's order : that 50 barrels were ready for shipment, and they expected the balance would be ready in a day or two : that he hoped to be able to supply part of the other lots, but did not think it probable he could all, unless he (Colgate) would pay market prices. He said he was sorry Colgate did not take the precaution to ascertain if he could supply 250 barrels before he sold that quantity : that Colgate would not find anything in the defendant's letter to warrant his selling any particular quantity : that if he had told them to buy 300 barrels on the 22nd, instead of saying he could sell that quantity, they could have managed it, but his first telegram was dated the 31st ;—and finishes by inquiring what Colgate could give for oil.

Colgate answered this by letter, dated 11th of September, pressing the fulfilling his sales to S. Green & Co., and to W. D. Harris & Co., remarking that the defendant, in answer to his enquiry as to price, had put no limit to the amount of sales, but that the defendant would be pleased to receive his orders, and arguing that the defendant should have notified him of a change of prices.

On the 15th of September the defendant wrote again to Colgate, saying that if it were possible he would send all the oil at the price first quoted. If not, they had no objection to furnish the oil without profit, and thought he could manage it at an advance of 5 to 7½ cents per gallon. Colgate in reply, by letter dated 19th of September, insisted that he sold as instructed, and that all the 250 barrels were sold in the same way.

This witness proved another letter written by him to the defendant, dated 13th of September, 1865, but not important to the present enquiry. He also produced a letter from the defendant to himself, dated 30th May, 1865, stating that he had on hand 9 barrels of boiled oil and 14 barrels raw, and stating the prices, and stating his wish to hear what disposition Colgate could make of them.

On cross-examination he said he had no other business

but that of agent or commission merchant: that he never purchased linseed oil or any similar article on his own account: that he never acted as agent for the plaintiffs nor for commission in buying or selling any goods for them: that he had no interest whatever in the plaintiffs' purchase nor in their business. He said he went to New York on the 3rd of September, 1865, and returned about the 14th, and remained until about the 12th of October, and was in Chicago a day or two in November, and was not there again until the 2nd of January, 1866.

Another witness was examined as to the price of oil, with a view to damages, and one of the firm of McCormick & Callender to prove the partial fulfilment of the sale of 100 barrels to them by the delivery of 50 barrels, and a settlement made by the defendant for the non-delivery of the residue.

A witness was also called for the plaintiffs, who stated that he was a counsellor-at-law residing in Chicago: that if a contract was made which was to be performed within a year for goods over the amount of £10, it need not be in writing, as the 17th Section of the Statute of Frauds was not in force in the State of Illinois: that when a contract states no time for delivery, a reasonable time after making the contract would be the time for delivery.

A witness, resident in Toronto, proved that he was a druggist and dealer in paints and oils: that about the 1st of September, 1865, a clerk of the defendant's called, wishing to purchase 200 or 300 barrels of oil, and said it was to supply an order from the United States: that the price rose ten cents a gallon in large lots: that the defendant kept small lots on hand: that his business was chiefly in hardware: that they were selling oil at from 80 to 90 cents a gallon.

A number of objections were taken on the defence, both to the execution of the commission and the identification of the evidence attached to it as that taken before the commissioners, and also to the evidence itself, as not proving a case against the defendant.

The learned Judge ruled in favour of the plaintiffs, and

the parties agreed the verdict should be taken for \$300 damages, subject to the opinion of the Court, who might, at the plaintiffs' election, order either a nonsuit or a verdict for the defendant.

M. C. Cameron, Q. C., for the plaintiffs, cited *Leroux v. Brown*, 12 C. B. 801; *Williams v. Wheeler*, 8 C. B. N. S. 299, 316; *Gibson v. Holland*, 13 L. T. Rep. N. S. 293; *Lloyd v. Guilbert*, 33 L. J. Q. B. 241.

Burns, contra, cited as to the proof of agency, *Trickett v. Tomlinson*, 13 C. B. N. S. 663; S. C., 7 L. T. N. S. 678; as to the law by which the contract should be governed, *Carrington v. Roots*, 2 M. & W. 248; *Bill v. Bament*, 9 M. & W. 36; *Acebal v. Levy*, 10 Bing. 376; *Waydell v. Provincial Insurance Company*, 21 U. C. R. 612; Tay. Ev. 4th Ed. 61; *Fergusson v. Fyffe*, 8 C. & F. 121; *The Milford*, 4 Jur. N. S. 417; *Cope v. Doherty*, 4 Kay & Johns. 376; 2 *Kent Com.* 460; *Don v. Lippmann*, Tudor Lea. Cas. Merc. L. 213; Stor. Conf. L. 6th Ed. 241, 285; *Grell v. Levy*, 16 C. B. N. S. 73; S. C., 10 Jur. N. S. 210; *McIntyre v. Parks*, 3 Metc. 207; as to the objections to the commission, *Milligan v. Grand Trunk R. W. Co.*, 16 C. P. 191; *Muckle v. Ludlow*, Ib. 420 (a).

(a) A rule *nisi* was obtained, inadvertently it would seem, as the verdict was taken subject to the opinion of the Court. The objections taken were, in substance, that no authority to Colgate to bind the defendant was proved, at all events for the sale of any particular number of barrels: that according to the law of Upper Canada, the contract should have been made in writing: that the bought note proved was not signed till January, 1866, after this suit, and was in effect the only contract, and did away with any previous verbal one: that although a verbal contract in Illinois might be sufficient there, yet in suing on it in Upper Canada the *lex fori* must govern, and it must be proved by such evidence as would be sufficient there, *i.e.* by writing: that the alleged verbal contract was to be performed by the defendant at Toronto, and the oil shipped there for the plaintiffs, and the price to be paid there, so that it must be sufficient within the Statute of Frauds: that the contract, if made in Illinois, was not binding on the defendant till he adopted it, or unless it was shewn that he had the quantity of oil, which it was proved that he had not: that the commission was improperly executed, being to four commissioners and executed only by three, that there was no proper affidavit of execution, and the evidence was not identified, nor was it shewn what oath the commissioners took.

HAGARTY, J. delivered the judgment of the Court.

As to the objections to the commission, we do not think they should prevail. The defendant attended with counsel and witnesses before the three commissioners, apparently without objection; and the due swearing* of the commissioners, we think, appears from the affidavit of execution; and the evidence annexed is sufficiently identified.

The parties at the trial consented to a verdict subject to the opinion of the Court. No power, however, was reserved to us to draw inferences, and we assume that our duty is merely to see if any legal objection exists to the plaintiffs obtaining or holding such verdict.

As to the authority, we think there was evidence to go to the jury of the defendant or his agents writing the letters produced to Colgate. His evidence shews that the defendant, at least in the McCormick sale, acted on the letters so produced.

We think, also, there was evidence that the defendant, knowing Colgate to be a broker and getting a commission on sales at a specified rate, expressed his readiness to furnish oil at a named price, and solicited Colgate's orders therefor, and that they knew he could sell 300 barrels: and that the defendant adopted a sale of 100 barrels made by the broker to McCormick & Callender, and did not expressly repudiate another sale to one Harris, although he did not fulfil it. We do not, therefore, see that Colgate was without authority to sell this 100 barrels to the plaintiffs at the price named by the defendant himself.

The point chiefly pressed on us was the absence of a written contract.

If the defendant's contention that no valid contract exists be right, we could easily dispose of the case. He relies on the 17th Section of the Statute of Frauds. The plaintiffs answer this by proof that by the law of Illinois the "*Lex loci contractus*," no writing is required. As is alleged, the defendant through his agent made a contract in Illinois at Chicago, to sell to the plaintiffs, who resided there, a quantity of oil, to be delivered by the defendant, a resident of Toronto, at

Toronto to the Grand Trunk Railway Company, to be carried by them to Chicago, the price payable in Toronto.

By Canadian law such a contract must be evidenced by writing. The bought note produced at the trial, made by the broker, was shewn to have been really made in January, 1866, after this action was commenced, and therefore insufficient—*Bill v. Bament*, (9 M. & W. 36) cited by Willes, J. in *Williams v. Wheeler*, (8 C. B. N. S. 313), and again in *Gibson v. Holland*, (L. R. 1 C. P. 1).

The question chiefly argued before us was which law was to govern, our own or that of Illinois.

In the *Peninsular and Oriental Steam Co. v. Shand*, (12 L. T. Rep. N. S. 809), in the Privy Council, Lord Justice Turner, after noticing the conflict of authority, says, in delivering the judgment of the Court: "The general rule is, that the law of a country where the contract is made governs as to the nature, the obligation and interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign Court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."

The contract there was to carry goods made in England, (with a clause exempting the carrier from liability in certain cases) thence to the Mauritius; and the judgment of the Privy Council held that the contract as made in England was to govern, not the law of the place of delivery, by which latter law the carrier could not have been so protected.

In the much discussed case of *Leroux v. Brown*, (12 C. B. 801), it was held, in substance, that there is a distinction between the 4th Section of the Statute, which enacts that no action shall be brought upon any agreement which is

not to be performed within a year, unless in writing, &c., and the 17th section, which declares that no contract for the sale of goods for £10 or upwards shall be allowed to be good, &c.: that the 4th section applies not to the validity (or, as it is called, the "solemnities") of the contract, but only to the procedure; and therefore that the plaintiff could not maintain an action in England on a verbal contract extending over a year in France, where no writing was required: that the remedy may exist in France, though not enforceable in England. But the 17th section was considered to avoid the contract altogether—therefore to affect the "solemnities"; and therefore a verbal contract good where made can be enforced in an English Court, notwithstanding its coming expressly within the 17th section.

This decision is strongly questioned by Willes, J. in *Williams v. Wheeler*, (8 C. B. N. S. 316). He says, "I cannot help observing that I should require much more argument to satisfy me that a contract made in France without writing, which is valid by the French law, is incapable of being enforced in an English Court, by reason of the requirements of the English law as to the formalities of contracts made in England. The general rule is that *locus regit actum*. And, although I fully recognize the rule upon which the judgment of this Court in *Leroux v. Brown* professes to be founded: viz., that the procedure is regulated by the *lex fori*, I am not satisfied that either of the sections of the Statute of Frauds to which reference has been made warrants the decision.

This doubt as to *Leroux v. Brown*, repeated in *Gibson v. Holland*, does not, however, help the objections taken by the defendant.

It was also argued that, as the contract was to be performed in Toronto by the delivery of the goods to the carrier and by payment there, the law of the place of performance should govern. On this subject Sir George Turner says, in the judgment already cited, "Every one who is but moderately familiar with the text books and decisions must know how easy it is to produce authorities on either side, when the

question is by what law to interpret a contract in one country, and to be performed, wholly or partly, in another; but if these be carefully examined, it will be found, after all, that the same general principles have for the most part prevailed throughout, and that where the conclusions vary, they do so from distinctions more or less minute in the facts."

It may well be that if any part of the contract to be performed in England would be in itself contrary to or in violation of our law, our Courts would refuse to enforce it, even if shewn to be legal by the *lex loci contractus*. See *Robinson v. Bland* (2 Burr. 1077); *Grell v. Levy* (16 C. B. N. S. 73); and the subject discussed, Story Conflict of Laws, secs. 279-80; 2 Kent. Com. 458; Tudor Lea. Cas. Merc. L. 213.

But we have seen no case in which, if the parties had bound themselves by a contract lawful and obligatory in the place of making, its performance in another country would be refused, because certain solemnities required by the law of the latter had not been observed in its original creation.

If the parties have once bound themselves lawfully for any universally lawful purpose, such as here for the sale of goods at a fixed price, it appears to us that our Courts must hold them bound here as they would be in the place of contract.

We think, on the whole, the rule must be discharged.

Rule discharged.

CREIGHTON V. ALLEN AND LEWIS FRETZ.

Joint note—Statute of Limitations—Payment by one joint maker, C. S. U. C. ch. 44, secs. 3, 4.

A note signed by two persons beginning "I promise to pay" is joint and several.

Payments made by one of two such makers will not take the case out of the statute as against the other, unless made expressly as his agent and by his authority, and such agency must be proved by the plaintiff apart from the fact of payment.

In this case, there being no such proof, a nonsuit was ordered as to one of the two joint makers, and the verdict allowed to stand as against the other.

THE declaration was upon three promissory notes, respec-

tively dated, 20th February, 1856; 7th April, 1856; and 17th April, 1854. Each of them was drawn "I promise to pay," no words to the effect of jointly or severally. These notes were signed by both defendants. The pleas to each were: 1st, Payment; 2nd, Statute of Limitations.

The trial took place at Napanee, in April 1867.

To take the case out of the Statute, evidence was given that the defendant Lewis paid the interest on all three notes in 1859, (the notes matured at different days). Evidence was also given that in 1861 the defendant Allen paid all the interest (viz. two years) then due. There was also proof of verbal acknowledgments of indebtedness to the plaintiff within two years.

For the defendant Lewis a nonsuit was moved, because the payment in 1859 was more than six years before this action was brought, and it was insisted that the payment by Allen did not bind Lewis: that Allen was not proved to be his agent, and payment of interest by him would not take the case out of the Statute.

Leave was reserved to move for a nonsuit as to the case being by the payment (there being no written acknowledgment) taken out of the Statute. The question of agency was submitted to the jury. It was also objected that the plaintiff could not have a verdict against one defendant. The learned Judge overruled this, also reserving leave to move on it. The declaration as originally framed charged that the defendants jointly promised. It was amended—at least on the record the words "jointly and severally" were interlined, though there was no other note on the record of any amendment or order to amend. The learned Judge refused to allow the defendants to add a plea denying the making.

The jury found for the plaintiff on all the notes, with interest.

Holmsted obtained a rule calling on the plaintiff to shew cause why there should not be a new trial, on the law and evidence, and for misdirection, in telling the jury that a payment by one of the makers of the note would take the case

out of the Statute ; or to enter a nonsuit as regarded Lewis Fretz, on the leave reserved ; or for a new trial as regarded him, as there was no evidence to sustain a verdict against him, and for misdirection.

K. MacKenzie, Q. C., shewed cause, citing *Notman v. Crooks*, 10 U. C. R. 105 ; *Rosc. N. P.* 400 ; *Consol. Stat. U. C.*, ch. 44, secs. 2, 3, 7 ; 19 & 20 Vic., ch. 97, (*Imperial Act*).

Holmested, contra, cited *Bateman v. Pinder*, 3 Q. B. 574 ; *Cleave v. Jones*, 6 Ex. 573 ; *Burn v. Boulton*, 2 C. B. 476 ; *Sm. Lea. Cas.*, 6th Ed., 574.

DRAPER, C. J., delivered the judgment of the Court.

The authorities shew that these notes, notwithstanding their language "I promise to pay," are joint and several. See note to *Chitty on Bills* 355, 10th Ed., where they are collected.

The third section of our *Consol. Stat. U. C.* ch. 44, protects any joint contractor from losing the benefit of the Statute of Limitations, by reason only of a written acknowledgment or promise made and signed by any other joint contractor, or by reason of any payment of principal or interest made by any other or others of them.

The omission therefore of a proviso similar to that contained in the English Statute 9 Geo. IV. ch. 14, sec. 1, "that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever," from our Act, cannot affect this case ; for the third section of our Statute goes beyond the Statute 9 Geo. IV., above referred to, in this, that the latter part of that section "or by reason of any payment," &c., is not contained in the English Act, which provides only for the case of a written acknowledgment or promise, and excludes by the proviso any interference with the then existing law as to part payment. Our Legislature anticipated the English Statute 19 & 20 Vic., ch. 97, sec. 14.

The payment by the defendant Allen as a joint maker of this note, and as having in that character authority to pay

it, will not therefore affect the defendant Lewis; and unless Allen made this payment in 1861 expressly as the agent and as the act of Lewis, and by his authority, it did not affect the right of the latter to set up the Statute of Limitations.

The mere indorsement of payment on the notes made by or on behalf of the payee of the note is not sufficient proof of payment to take the case out of the Statute. We think that the presumption arising from the payment made by Allen in 1861, is that he paid as one of the makers, and so on his own authority, and not as agent for Lewis. Proof of such agency should have been given by the plaintiff.

Now, part of the plaintiff's evidence tends the other way, for his first witness swears that when Lewis paid the interest in 1859, he declared that Allen had sent him; when Allen paid the interest in 1861, he said nothing respecting his father, Lewis. The fact that he paid it constitutes the whole ground for inferring the agency. There was other evidence of conversations and verbal acknowledgments of his being indebted to the plaintiff, sufficient to charge him before our Statute, but wholly valueless for that purpose since.

It appears to us, therefore, that as to Lewis there was no evidence, and the plaintiff should have been nonsuited as to him, or a verdict directed in his favor. Upon being satisfied of the payment by Allen, in 1861, the jury properly could find against him under the 4th section of our Consolidated Statute, although the action was against the two. We think there was evidence to sustain a finding against him.

In our opinion the rule should be made absolute for a nonsuit as to the defendant Lewis, and be discharged as to the defendant Allen.

Rule accordingly.

CAMPBELL ET AL. V. FOX.

Registry Acts—9 V., ch. 12, 10 & 11 V., ch. 38.

L. conveyed to D., in 1832, and D. to C., in 1833. Plaintiff was C.'s heir. These deeds were registered in 1833, but not in accordance with the acts. D's heir in 1857, conveyed to K., who had notice of the previous deeds, and through whom defendant claimed. K. registered his deed in 1857; and in 1866, the plaintiff had his two deeds "examined and re-entered" under the 9 Vic., ch. 12, 10 & 11 Vic., ch. 38, passed to remedy the errors in previous registries.

Held, that the plaintiff's title clearly must prevail, for under the then registry acts, as the title first became a registered one in 1857, K. gained nothing by his prior registration, and if he had, his interest so acquired would not be protected by the remedial acts.

EJECTMENT.—The land in dispute was patented on the 2nd April, 1832, to John Lawrence.

By deed, dated 30th April, 1832, Lawrence sold in fee to Elias Dulmage.

By another deed, dated 3rd January, 1833, Lawrence sold it again to Elias Dulmage.

By deed, dated 15th January, 1833, Elias Dulmage sold to Henry Cassady, of whom the plaintiffs were heirs at law.

On the 8th of May, 1857, George B. Dulmage, heir of Elias Dulmage, purported by deed to convey to one Knapp, through whom defendant claimed.

On this short statement of facts the plaintiffs' right to recover would be beyond question.

The defence was rested on the registry acts. It appeared that the second deed from Lawrence to Dulmage, and the deed from the latter to Cassady, were duly presented for registration, and certificates of registration endorsed thereon, on the 6th of April, 1833. But by either mistake or fraud the proper entries necessary for registration were not made, and the Statute then in force was clearly not complied with so as to make an effective registration.

The deed given on the 8th May, 1857, by the heir of Dulmage to Knapp, was duly recorded on the 12th May, 1857, with another deed hereafter noticed.

Thus the title appeared to have become a registered title for the first time, in May 1857.

It was proved by Mr. Ponton, Deputy Registrar, that before Knapp's deed was brought to the office for registration, Knapp had been there to search the title to these lands, and he was shewn the memorials of the two deeds, Lawrence to Dulmage, and Dulmage to Cassady, which, though there, had never been entered in the books, and the Deputy explained this to him.

Knapp it seemed had got possession of the earlier deed given by Lawrence to Dulmage, and he registered it on the same day as his deed from Dulmage's heir, viz., 12th May, 1857, and before the deed to himself.

The deeds from Lawrence to Dulmage and Dulmage to Cassady were examined and re-entered on the 3rd December, 1866, under the acts 9 Vic. ch. 12, 10 & 11 Vic. ch. 38. It was admitted that defendant paid Knapp \$500 for the lot.

A verdict was taken for the plaintiff subject to the opinion of the Court.

Crooks, Q. C., for the plaintiff, cited *Scott v. McLeod*, 14 U. C. R. 574; *Doe Pell v. Mitchener*, Dra. Rep. 484; *Doe Hennesy v. Myers*, 2 O. S. 424; *Neeson v. Eastwood*, 4 U. C. R. 271; *Doe Brennan v. O'Neil*, Ib. 8; *Doe Cronk v. Smith*, 8 U. C. R. 376; *Doe Prince v. Girty*, 9 U. C. R. 41.

Wallbridge, Q. C., for defendant, cited *Doe McLean v. Manahan*, 1 U. C. R. 491.

HAGARTY, J., delivered the judgment of the Court.

We shall have occasion to notice the statutes passed to remedy these mistakes, but assuming there had been no special legislation, we see nothing to support defendant's title.

Until a memorial had been registered, it was wholly unnecessary for Cassady or those claiming through him to register their title-deeds. The registry laws had no operation until the title became a registered title. This has been the law of this Court from the earliest time. It is not easy to understand, then, how the title vested in Cassady by regular transmission by unregistered deeds from the Crown, can be divested by the heir of Dulmage, having no estate whatever to convey, affecting to convey to Knapp twenty-four years

after his ancestor had parted with the estate, and by placing on record the conveyance to his ancestor and a conveyance from himself to Knapp.

As the law then stood, every deed executed after the 1st January, 1851, would be held void against any subsequent purchaser for value, unless a memorial be registered before the registering of the subsequent purchaser's deed. But this provision did not affect deeds executed before 1851, nor impose any new obligation on purchasers, like Cassady, before that time of an unregistered title—13 & 14 Vic., ch. 63.

Then as to the Statutes: An Act was passed in 1846, as to the errors committed by McLean, Deputy Registrar of that county, (9 Vic., ch. 12), extended by an act of the next year, (10 & 11 Vic., ch. 38), to errors of Smith, Deputy Registrar, (the officers by whom these memorials were received and not entered), enabling persons to bring in their deeds, and have them marked and properly entered in the books, &c., "examined and re-entered," and providing that such deeds should then be taken to have been duly registered as of the date of the original certificate, "provided that nothing in this Act contained shall divest or be construed to divest from any person or persons any estate or interest in lands acquired by such person or persons, without notice of a prior defectively registered conveyance thereof, which estate or interest in lands is now vested in such person or persons, under or by virtue of the provisions of an Act" (35 Geo. III, the then Registry Act), "but that such estate and interest in lands so acquired without notice of such prior defectively registered conveyance shall remain vested as if this Act had not been passed."

These Acts were continued from time to time and are still in force by temporary renewal, and under their provisions the plaintiffs had their deeds from Lawrence to Dulmage, and from Dulmage to Cassady, "examined and re-entered" on the 3rd December, 1866, and again on the 8th of March, 1867.

Now as the heir of Dulmage had nothing whatever to convey to Knapp, we think there was no title or interest which,

in the words of the Act, Knapp could claim, or in any view could be vested in him until he placed the memorials on record on the 12th May, 1857, as it could only be by virtue of the registry Acts that any interest could vest in him.

Except by some advantage to be gained by prior registration, Knapp could not possibly take anything in the land, as all Dulmage's title had been long before conveyed to Cassady. Therefore, by the re-registration of Cassady's deeds under the remedial Act, and allowing this to relate back to the defective registration in 1833, the only estate or interest of which Knapp could be divested would be what (if any) he had acquired by registration; and the proof is clear, that before he did so register, (if not when he bought), he had full notice of the prior defective registrations.

On this construction, Knapp's claim would be defeated by the re-registration. The position of the defendant, his vendee by deed in 1860, is not explained by the evidence, whether he was a volunteer or a purchaser for value within the registry laws, or cognizant of Knapp's peculiar title or not.

It was not suggested, either at the trial or in argument before us, that the defendant was in any better position than his vendor Knapp.

It seems unnecessary for us to discuss this, as in our view of the law the plaintiffs' title did not require the aid of these remedial acts to prevail.

Postea to plaintiffs.

CAMPBELL V. CORPORATION OF YORK AND PEEL.

Services of Registrar under 29 Vic. ch. 24, secs. 26, 33—Action for—Joint liability of Counties after separation—Pleading.

Under the provisions of the registry and municipal acts, 29 Vic. ch. 24, and 29-30 Vic. ch. 51—*Held*, that the Counties of York and Peel were jointly liable to the Registrar of Peel, for services rendered by him, under secs. 26 and 33 of the Registry Act, before the separation of these counties.

Held, also, that the provision in sec. 70, of the Registry Act, authorising the Inspector to certify the amount, rendered the general averment in the declaration of services rendered sufficient.

DECLARATION.—That the plaintiff before and at the time of the passing of the Act, 29 Vic., ch. 24, and entitled “The Registration of Titles (Upper Canada) Act,” was, and has ever been since hitherto continued to be, and still is the Registrar of the County of Peel, formerly one of the United Counties of York and Peel, in Upper Canada, and that before the separation of the union of the said united counties, a separate registry office, within the meaning of the said Act, was at the time of the passing of the said Act, and has ever since hitherto continued to be, and is established in the said County of Peel, and the plaintiff as such Registrar, after the passing of the said Act, and before separation of the union of the said united counties, and before the commencement of this suit, did and performed certain duties required to be done under the provisions of sections 26 and 33 of the said Act, the fees and allowances to the plaintiff as such Registrar for which duties, according to the said Act, amount to certain large sums of money, to wit, for the duties so performed under said section 26, to the sum of \$963.61, and for the duties so performed under said section 33, to the sum of \$2,000, making together the sum of \$2,963.61; and which fees and allowances were afterwards duly settled and certified by the proper Inspector of registry offices in that behalf, and the said duties so done and performed by the plaintiff as such Registrar were services required by the said Act, and were all the services required by the said Act to be per-

formed by the plaintiff as such Registrar of the said County of Peel, under sections 26 and 33 of the said Act; and the plaintiff after he had done and performed the said duties and services, according to the said Act as aforesaid, and before the commencement of this suit, did, in pursuance of and according to the provision in that behalf in the said Act contained, duly request the proper Treasurer in that behalf to pay to him, the plaintiff, the said fees and allowances for the said duties and services, and said Treasurer refused and neglected to pay the same; and the said County of Peel was afterwards, and before the commencement of this suit separated from the said County of York, under the provision of the Statute in that behalf; whereupon, and by force of the said Act, an action accrued to the plaintiff to demand and recover from the defendants the amount of the said fees and allowances, being a large sum of money, to wit, the sum of \$2,963 61, aforesaid, and his costs of this suit.

Demurrer, by the Corporation of the County of York, on the grounds: that the cause of action (if any) is alleged to have arisen before the defendants had a separate corporate existence, and they cannot in their present corporate capacities, jointly owe a debt for services rendered before they had such existence: that either the Corporation of the County of Peel or the Corporation of the County of York must owe the debt, if there is any: that one distinct debt is claimed for several distinct and separate services: that the plaintiff is not by law a Registrar coming within section 23 of the Act in the said declaration mentioned: that there is no sufficient averment to show that the plaintiff was in a position to do or did do work under section 26 of the said Act, and before any work could be done, under section 27 of the said Act, a request under the hand of the Inspector was necessary, and such request was a condition precedent, and not being averred, no right of action is shewn.

M. C. Cameron, Q. C., for the demurrer. *Robert A. Harrison*, contra.

The Statutes referred to are cited in the judgment.

HAGARTY, J., delivered the judgment of the Court.

The chief difficulty is, as to the joint liability claimed against the two corporations.

Section 70 of the Registry Act declares that, should the County Treasurer of any county or city in which a separate registry office is established, on request of the Registrar for the duties performed according to this act, refuse to pay the fees, &c., for services under sections 23, 26, 27, and 33, such Registrar may prove and recover the same, and the costs thereof, from the corporation of the county or city in any Court of Record in Upper Canada, and the Inspector's certificate of the amount, and of the services rendered, shall be *prima facie* evidence of the right to recover.

Prior to the final separation, the amount would be certainly claimable from the Treasurer of the united counties, and against them the action would be brought.

The Acts relating to the separation of Peel throw no light on the question before us, so that its decision seems cast upon the general Municipal Acts providing for the separation of counties.

This debt is stated in the declaration as an existing liability of the United Counties of York and Peel, prior to and at the final separation.

The new Municipal Act, 29-30 Vic., ch. 51, came into force on the 1st January, 1867, at the same time that Peel was finally separated from York, so that to this enactment reference may be made instead of the Consolidated Statute.

Section 46 provides, that after the erection of a jail and court-house in the junior county, the latter may enter into an agreement with the senior county, for payment thereto of any part of the debts of the union, as may be just, &c.

Section 48 provides for an arbitration if such agreement be not made, but a clause added by the succeeding Act, (ch. 52), excludes from its operation any county where proceedings for the separation had been taken before the passing of the Act, thus excluding Peel from the clause.

Section 61 declares, that in case of the separation of a county from a union of counties, each county which formed

the union shall remain subject to the debts and liabilities of the union, as if the same had been contracted or incurred after the dissolution by the respective counties which constituted the union.

By section 62, after the dissolution the senior county shall issue its debentures or other obligations for any part of the debt contracted by the union, for which debentures or other obligations might have been but had not been issued before the dissolution; and such debentures, &c., shall state the liability of the junior county therefor under this Act; and the junior county shall be liable therefor as if the same had been issued by the junior county.

Section 63 directs that after dissolution all special rates shall continue to be levied in the junior county, whose Treasurer shall pay over the same to the senior county.

Section 64—If such amount so paid to the senior county, or to any creditor of the senior county, in respect of a liability of the union, exceeds the amount which by agreement or award between the councils the junior county ought to pay, the excess may be recovered by action, as for money had and received.

Section 240 directs that after dissolution the senior municipality may make an anticipatory appropriation for the relief of the junior municipality, in respect of any debt secured by By-law, in the same manner as the senior municipality might do on its own behalf.

The nature of the services for which payment is claimed would, under section 26 of the Registry Act, seem to be that the Registrar of Peel before the separation had received from the registry office of York original memorials and statements of title affecting land in Peel, and that he made copies thereof in his books; and, under section 33, the making of proper indices in accordance with the provisions of that Act.

The County of York alone sets up this legal defence, and (apart from statutable obligation) might contend with some show of justice, that the county which chose to separate from it, for the anticipated advantages of an independent existence, should bear the cost occasioned by placing its own regis-

try office in a state to answer the requirements of the new law. We, however, must decide it wholly on the Statutes.

Section 61 seems chiefly applicable; assuming, as we have done, that the plaintiff's claim was a liability against the united counties on the day of final separation.

The Legislature declares that each county which formed the union shall remain subject to the debts and liabilities of the union, *as if the same had been contracted or incurred after the dissolution by the respective counties* which constituted the union.

The question seems narrowed down to this—is the liability continued as a joint or several liability? Each is certainly liable. If either be sued alone, could it plead in abatement the non-joinder of a co-contractor? The intention to continue the liability is clear; the form in which it should be enforced does not seem to have been present to the mind of the Legislature.

In ordinary phrase, if it were declared that A. and B. should be liable to pay a particular amount as if that amount had been contracted respectively by them, it would, we think, mean a several and not a joint liability. But it is here somewhat different. A. and B. were both liable previously for the amount under a corporate name. This action was commenced after the dissolution.

It is to be observed that every portion of the united counties was bound for this debt when it accrued; it is hardly therefore the creation of a new liability, but rather a continuance of one previously existing. Section 62, already noticed, suggests an analogous difficulty. The senior county may, after dissolution, issue *its* debentures for any debt of the union for which debentures might have been issued but for the dissolution; such debentures shall recite the liability of the junior county *under this Act, and the junior county shall be liable therefor as if the same had been issued by the junior county.*

Now, in the latter case, should the debenture holder sue the counties together, as in this case, or sue separately? The clause says it may issue *its* debentures, meaning, we

suppose, that the debenture will be on its face a debenture of the senior county.

If treated as a several liability and recoverable as such, there would be no greater difficulty as to obtaining contribution (if such be obtainable) from the mere form of action. The same question would arise on the plaintiff levying the whole amount of his judgment from one of the defendants in a joint action. The right to contribution would depend on the substantial nature of the transaction and liability, not on the form of action against both or one.

In the case of the debenture, under section 62, we think the result is, that it is the debenture of both—that each is liable upon it, and they may be sued together. It is certainly the debenture of the senior county, and the junior is to be liable on it *as if it had been issued by the junior county*.

The words in the 61st section, which directly governs this case, are less strong, and the expression “respective counties” would point rather at a several liability. But it says that each county shall *remain* subject to the debts and liabilities of the union, pointing less to the creation of a new than the continuance of an existing liability; and the words “as if the same had been contracted or incurred after the dissolution by the respective counties which constituted the union,” may be satisfied by treating it as a liability to which each has become a party with the other—as if three persons sign a promissory note in the singular number, they can all be sued upon it in one action.

At the moment of dissolution it is a debt due by all the united counties; it continues a debt against all, as if after each had commenced its independent corporate existence, it had been again contracted by them jointly with the others.

It is not without hesitation we arrive at this conclusion, but we deem it the most in accordance with the general intention of the Legislature.

Without the aid of the Statute we think the general averment of services rendered would be open to the objections taken.

Section 70 declares that the inspector may certify for duties performed under the sections mentioned in the declaration, and his "certificate of the amount and of the services rendered shall be *prima facie* evidence of the right to recover." He is, as it were, the taxing officer, on whom is cast the duty of fixing the amount and scrutinizing the items, and we think under this Statute the allegation may be held sufficient.

Judgment for the plaintiff.

MARRS V. DAVIDSON.

Survey—C. S. U. C. ch. 93, sec. 28—Double-front concessions—Description of land—Trespass—Leave and license.

The 12 Vic. ch. 35 sec. 37 (Consol. Stat. U. C. ch. 93, sec. 28) which prescribes the rule for drawing the side lines in double-fronted concessions, applies to townships theretofore surveyed.

Held,—following *Warnock v. Cowan*, 13 U. C. R. 257, and *Holmes v. McKechin*, 23 U. C. R. 52, 321—that the lands having been described in half lots is made by that section part of the definition of a township with double front concessions.

Held, also, that the rule prescribed applies to all lands in such concessions, not to the grants of half lots only, and that it is brought into application by the granting of any half lots.

Semble, however, that the section is on both points open to doubts, which it is desirable to remove by Legislation.

Where land was described as commencing at a post planted four chains and fifty links from the north-east angle of a lot—*Held*, that the post (the existence and position of which were satisfactorily established) was the point of commencement, though its distance from the true north-east angle was inaccurately given.

The declaration charged the trespasses, breaking down fences, &c., as committed on divers days and times. Defendant pleaded leave and license, which the plaintiff traversed. It appeared that part of the fence was removed under a license, and the remainder after it had been revoked, the interval from the first to the last removal being two or three years.

Held, that the plaintiff was entitled to succeed, though it would have been otherwise if the declaration had only charged the trespasses as committed on the same day, for the defendant could then have applied the license to the only trespass charged.

TRESPASS to part of lot No. 9, in the third concession of Emily, commencing where a post was planted by or on behalf of B., in or before 1848, at the distance of four chains and fifty links from a point which was then known as the north-

east angle of said lot No. 9; then south 74° west 4 ch. 50 l.; then south 16° east to the centre of said lot; then north 74° east, 4 ch. 50 l.; then north 16° west to the place of beginning—breaking down fences, &c.

Pleas.—1. Not guilty. 2. Leave and license. 3. Land not the plaintiff's.

The trial took place at Lindsay, in November, 1866, before Morrison, J.

The case, after taking all the evidence and some legal objections, went off thus: It was agreed there should be a verdict for the plaintiff and 1s. damages, with leave to defendant to move for a nonsuit or a verdict to be entered for the defendant. The points for the plaintiff were that the concession was a single fronted one, and so the north-east angle as formerly understood was right; but that, whether the angle was there or was one chain further east, which it would be if the concession was a double-fronted one, that the plaintiff starts from the post mentioned by Mr. Boulton in his deed, and was therefore entitled to succeed. The defendant contended to the contrary, and also insisted that his plea of license was proven. The Court was to draw inferences of fact, and the plaintiff had leave to apply to reply or to new assign, if the Court should think the plea of leave, &c., proved, but that on the evidence a sufficient answer was made out.

In Michaelmas term, 1866, *Hector Cameron* obtained a rule calling upon the plaintiff to shew cause why a nonsuit or a verdict for defendant should not be entered, pursuant to leave reserved, on the ground that the concession in question is a double-fronted concession, and the evidence shews that according to the true survey the land in question does not belong to the plaintiff; also, that the starting point of the description of the plaintiff's land must be at the distance of four chains and fifty links from the true north-east corner of the lot; and also that the plea of leave and license was established by the evidence.

In Hilary Term, *C. S. Patterson* shewed cause.

The facts of the case, with the authorities and arguments, are sufficiently stated in the judgment.

DRAPER, C. J., delivered the judgment of the Court.

On the 5th of August, 1840, the Crown granted to the Hon. G. S. Boulton the north half of lot 9, in the third concession of Emily, and on the 3rd of November, 1848, he conveyed to one Mitchell fifteen acres, parcel of this half lot, by a description, "commencing at a post planted four chains and fifty links from the north-east angle of the said lot," No. 9. Before making a conveyance of any part of this half lot, Mr. Boulton employed a surveyor to mark the boundaries of the subdivision he was making, as he had sold a piece of land the description of which commenced at the north-east angle of this lot, to the Rev. Mr. Shaw, by deed dated the 20th of February, 1844, and had given a strip of the same width as Shaw's for the church, and reaching to the southern limit of the half lot; and Mr. Boulton gave evidence that, among other posts, there was one planted to mark the north-east limit of the piece conveyed to Mitchell.

For some months after the conveyance to Mitchell, there was no statutory regulation as to concessions having double-fronts, and until the passing of the 12 Vic. ch. 35 (30th May, 1849) the posts which had been planted to mark the front angles of lots were by law unalterable boundaries, and the side lines were to be run from those posts. The side line between this lot and the adjoining, No. 10, appears (the evidence is not direct) to have been run accordingly, and the north-east angle to have been thus ascertained. But the thirty-seventh section of this Act declared that in those townships in which the concessions had been surveyed with double-fronts, and the lands had been described in half lots, the side lines should be drawn from the posts at both ends to the centre of the concession, and each end of the concession shall be and is declared to be the front of its respective half of such concession, and that a straight line adjoining the extremities of the side lines of any half lot in such con-

cession, drawn as aforesaid, shall be the true boundary of that end of the half lot which has not been bounded in the original survey.

The principal question in dispute was whether this was a concession with double-fronts.

For the plaintiff it was insisted that the Statute, 12 Vic. ch. 35, (Consol. Stat. U. C. ch. 93) could not have an *ex post facto* operation, and that at the date of the deed to Mitchell the north-east angle of the lot could only be ascertained by running a line on the proper course from the front of the concession: that this appeared to have been done, and that the Statute could not make that erroneous which had been in accordance with existing law. It was also insisted that a township with double-front concessions must, according to the Statute, have the posts on both sides of the allowances for roads between concessions, and that the lands therein should have been described in half lots.

We have no doubt that the Statute did apply to townships theretofore surveyed, even though according to its precise letter there would be ground for questioning its application to townships to be thereafter surveyed. And there was abundant proof that this township was, so far as the planting posts on both sides of the concession roads went, one that came within the literal meaning of the Statute. We have felt more difficulty on the other question, as to the lands being described in half lots.

This expression has been assumed to be part of the definition of a township with double-front concessions. In *War-nock v. Cowan* (13 U. C. R. 257) which was decided by the late Mr. Justice Burns and myself, it was so treated, as also in the judgment of this Court in *Holmes v. McKechin* (23 U. C. R. 52, 321). Nevertheless, though perhaps not open to question in this Court, it may be doubted whether this clause of the Statute should not be read thus: "In those townships in Upper Canada in which the concessions have been surveyed with double-fronts (that is, with posts or monuments planted on both sides of the allowances for roads between the concessions) and the lands in which townships

have been described in half lots, the division or side lines shall be drawn," &c—treating the words which are placed in a parenthesis as containing the whole definition of concessions with double-fronts. The words "and the lands have been described in half lots" would point out in what cases the side lines are to be run from the front and rear of the concessions to the centre, namely, whenever a half lot is granted, and the rule, though the Statute does not say so, would apply equally to a quarter lot.

In the twenty-sixth section of the Consolidated Act, it is provided that the front of each concession of Upper Canada where only a single row of posts has been planted on the concession lines, and *the lands have been described in whole lots*, shall be that end or boundary of the concession which is nearest to the boundary of the township from which the concessions are numbered. We have here the same phrase "the lands have been described." In this section twenty-six both descriptions, that of a single row of posts having been planted and the grant of the lands in whole lots, are combined, for the determining in what cases the front of the concession is to be governed by the rule given. Why should a different method obtain as to construing the other section?

We think, though not without some hesitation, that the right construction was adopted in the former cases.

No uniform system of granting lands in this township of Emily, which would shew how the survey was treated in reference to the division into half lots, seems to have been followed in the public offices. From the evidence it appears that in 1823 the north-east quarter of No. 10, 3rd concession, was granted, and the description commences in the centre of the concession. In 1824 there were grants of the north-west quarter of No. 20, in the 3rd concession, and of the north-west quarter of No. 7, in the 1st concession, and of the north-east quarter of No. 6, in the 3rd concession, and of the north-east quarter of No. 6, in the 5th concession. All these descriptions commence in the centre of the concession. In 1825, No. 6 in the 7th concession was granted as a whole lot. The description begins in front of the

concession, at the south-west angle of the lot, (the lots number from west to east) and runs thence to the rear of the concession, not referring to any post; and in the same year the north half of No. 13, 2nd concession, was granted, and the description commenced in the centre of the concession. In 1834, the west half of No. 3, in the 5th concession, was granted, though, according to the double-front concession principle, the lots were divided into north and south halves. In none of the foregoing grants is there any reference to the posts planted on the north of the respective concessions, and in 1856, a grant was made of the west half of No. 2, 3rd concession, without any description at all.

We do not think it possible to construe this section (28 of the Consol. Stat.) as prescribing a rule which is not to apply to all the lands which lie in concessions which have been posted on each side as the section describes. The rule cannot, we think, be limited to the grants of half lots. The inconsistency and inconvenience that would arise from that construction, and as a consequence holding that where a whole lot is granted the side line can be run from the post at the front angle, without regard to the system of survey or to the post planted in rear, can be readily illustrated by assuming No. 9, to be granted, and described as a whole lot, and the north halves of No. 8 and 10 to be separately granted. In nine cases out of ten, probably in a larger proportion, a line run from the front angle parallel to the governing side line, to the rear of the concession, will not strike the post planted in rear. In the present case the difference is about one chain, the post in rear being so much further east than the termination of the line run from the front angle. But the side lines of the north halves must begin at the posts planted in the rear of the concession, and go parallel to the governing line to its centre, and the result will be that the north half of No. 10 will be a chain distant from the side line of No. 9, which it ought to join, and a strip of land a chain wide will be included in the patents for No. 9 and for the north half of No. 8. It is impossible that a construction which will produce such results can be the true one, and we

see no other way to avoid it but by holding that where the concessions have double-fronts, this, and the express words of the Statute, *divide* the lands into half lots; and when, as in the present case, the concessions run nearly east and west, the division is into north and south halves; and that the granting of any north or south halves of lots brings the section into application, even if it must not necessarily apply from the nature of the survey and posts planted; and that any description in the patents at variance with the actual survey and the statute must give way.

I feel all the difficulty of so treating the language of the Act, and have in my own mind combatted many arguments that have suggested a different result; but at last we find it the only solution of the matter which we can reasonably adopt; for if it be held that the words, "the lands shall have been described in half lots," mean that the grants shall set forth the bounds, courses, &c., then this difficulty presents itself, that the practice of issuing patents without any such description commenced in the land granting department of Upper Canada several, perhaps fifteen, years or more before the Statute 12 Vic. was passed, and has been more or less followed ever since. If these words mean that the grants, though omitting to express the boundaries, should describe the lands as such a half lot, or some aliquot or other portion of such a half lot, *ex. gr.* as the east half of the north half; or in granting a whole lot should describe it as consisting of the east and west halves thereof, or the north and south halves, according to the direction of the double posted concession lines;—then, as we see in this case, as the case of *Holmes v. McKeehin* shewed, and as individual and general experience reminds us, no such rule has been uniformly followed, and such a construction would almost render the statutory provision a dead letter. The Legislature found it necessary, by the 9th section of the 18 Vic. ch. 83 (Cons. Stat. U. C. ch. 93, sec. 29) to remove one doubt as to the application of the law; perhaps a similar course may be deemed advisable to remove the doubts to which the words of the preceding section (28) have given rise.

The description in the deed to the Reverend W. M. Shaw begins "at the north-east angle of" No. 9: in that to Mitchell it begins "at a post planted four chains fifty links" from the same north-east angle. The deed to the Church Society (dated 20th September, 1848), is of a piece of land lying between the south boundary of the land sold to Shaw and the south boundary of the north half of No. 9. There seems no doubt whatever that Mr. Shaw and the occupants under the Church Society at the date of those deeds believed that the north-east angle of No. 9, was as the surveyor employed by Mr. Boulton had marked and ascertained it by running a line from the front angle of the lot; nor that the post planted at the original survey, on the line of the rear of the third concession, stood one chain to the east of this assumed north east angle; nor that Mitchell, under whom the plaintiff derives title, took possession of the land west of and adjoining to that previously conveyed to Shaw and the Church Society, according to their actual occupation, not according to what we consider the legal effect of the deeds to them.

For in our opinion we are compelled by the Statute to treat the true north-east angle of No. 9, to be that marked by the post planted at the original survey in rear of the third concession, and the consequence is, that Mr. Shaw took possession of a strip of land one chain wide, lying to the west of that which the description in the deed to him covers, and he and those claiming under him appear to have held upwards of twenty years. When the possession of the Church lot was first taken, does not so clearly appear, but its western boundary seems from the first to have been considered and acted on as a protraction of the western boundary of the land of which Mr. Shaw held the possession.

If therefore the plaintiff's case depended upon the words of the description, "commencing at the distance of four chains and fifty links from the north-east angle of No. 9," he would in our opinion fail, because, taking the true and not the supposed north-east angle as governing the description, his land would not extend to the *locus in quo*; that land would not be his.

But it is answered, that the description commences "at a post planted," and that the distance stated from the north-east angle is *falsa demonstratio*, for the post was there when Mitchell took possession, immediately adjoining where Shaw was in possession; the post was the material object from which his land was to be measured to the west, and from which it was measured (a).

It appears to us that the existence of the post referred to in the description, and the point or place at which it stood, were very satisfactorily established. If the words "four chains fifty links from the north-east angle of said lot No. nine" are rejected, there is no difficulty, for there is no pretence that there ever was any other post to which this description can refer. The fact that its distance from the north-east angle is inaccurately given cannot alter the description, that from this post the measurement of the land by the courses and distances given was to be made. No difficulty arises from want of title in the grantor to convey all that the description so applied would cover. Mitchell intended to buy and Mr. Boulton to convey the identical piece of land which the plaintiff claims to own. As a question of fact, we draw this inference without hesitation, as we think the Jury would have done if it had been submitted to them. The case is stronger than that of *Lyle v. Richards*, (L. R. 1 H. L. App. 222) for there is no contradiction as to the post referred to in the description, nor as to where it was planted, nor as to the land described, if that post is taken to be the place of beginning.

We think, therefore, that the land on which the trespass was committed was the plaintiff's.

The only remaining question is on the plea of leave (b). The declaration contained only one count, charging several

(a) Upon this point *Dunn v. Turner*, 3 C. P. 104, *Henderson v. Harris*, 10 C. P. 374; *Joiner v. Colborne*, 11 U. C. R. 631; *Hamilton v. Gould*, 24 U. C. R. 58; *Lyle v. Richards*, L. R. 1 H. L. 222, were cited on the argument.

(b) On this question the following cases were cited in the argument: *Barnes v. Hunt*, 11 East 451; *Hayward v. Grant*, 1 C. & P. 448; *Bracegirdle v. Peacock*, 3 Q. B. 174; *Styles v. Taylor*, 14 C. P. 93; *Hyde v. Graham*, 1 H. & C. 593.

acts of trespass as committed at the same time. The evidence shewed that part of the fence was moved two or three years ago, and that defendant had used the land since. The residue of the fence was moved only in the spring of 1866, when some ploughing was also done. On the earlier occasion, it was proved that the plaintiff and defendant staked out the line the whole length to which the fence was to be removed. It was also shewn that one Dixon had purchased from Mr. Boulton a strip of land a chain wide on the west side of the north half of this No. 9, and had put up a fence on the supposed east limit of this strip. Most probably the side-line between Nos. 8 and 9 had been erroneously run from front to rear, as had been the case between Nos. 9 and 10, and Dixon's fence had been put up according to that line. Afterwards he moved this fence one chain further east, thus taking part of the land which defendant now claims under a conveyance made in 1849 by Mr. Boulton of the north half of No. 9, except about three acres conveyed to the Reverend W. M. Shaw, another parcel to the Church Society, another parcel to William Mitchell, and also one chain on the west side of the said north half, being in fact the strip conveyed to Dixon. The defendant seems to have acquiesced in the removal of Dixon's fence, and to have claimed a similar right as against the plaintiff. The plaintiff admitted the correctness of the line which ran from the post planted in rear of the third concession, and said that unless defendant moved on to him he could not move on to the next lot east, *i.e.*, the Church property; and then the staking took place, the north part of the fence was moved, and the defendant made use of the strip of land as his own. But in the fall of 1865 the plaintiff forbid the defendant from moving any more of the fence, and in the following spring he forbid defendant's man from ploughing this strip, after which the residue of the fence was moved and some ploughing done. At or about the time when the first moving the fence took place there was a negotiation between the vestry of the Church and the plaintiff. According to the true line, it was found that a part of the parsonage-house was to the

west of their lot as it was described, and to remedy this it was proposed that the plaintiff should convey a quarter of an acre to them where the house infringed, and in consideration that they should give him an acre and a half of the rear part of their land, and a surveyor was instructed to mark it out, and then the plaintiff was to move the residue of his fence one chain further east. This proposal was not carried into effect, and the plaintiff's east fence has not been moved. Apparently it was after all this that the plaintiff forbid the defendant, as already stated. The defendant objected, that as only one trespass was charged he had a right to apply the leave which he had received from the plaintiff to cover it; and the plaintiff asked permission to amend if necessary, and the case went off at *Nisi Prius* as has been set forth.

The plea of license is an admission of the plaintiff's right to the land; and as the act of moving the fence was to be done upon that land, the license was revocable. But the plaintiff has only put the giving the license in issue by joining issue on the plea; and there was leave given in the the first instance to the removal, and to the defendant's entry on the land as his own, for the plaintiff was a party to the staking the line with that object.

The declaration as now amended charges the trespass to have been committed on divers days and times, and on the general replication, traversing it wholly, he is entitled to succeed, for the license was revoked before the last portion of the fence was removed.

The plaintiff is, therefore, entitled to our judgment, and the rule must be discharged.

Rule discharged.

WILLIAM HENRY FARRELL, BY HIS GUARDIAN, v. RICHARD FARRELL.

Will—Construction—Estate.

F., who died in 1861, by his will, made in that year, gave to his wife all his lands for life; and after her decease he devised to each of his seven children separate lands, adding "and in case any of the aforesaid legatees should die before he or she comes of age, or should die intestate, then and in such case his or her portion shall be equally divided among the remaining survivors." J. F., the eldest son, and one of the devisees, died intestate in 1867, at the age of thirty, leaving a son, the testator's widow having died in 1864.

Held, that J. F. being twenty-one at his father's death, took an absolute vested interest in fee in remainder expectant on his mother's death; that the devise over was void as being repugnant to this gift preceding it; and that the land devised to J. F. went therefore to his son, not among the other surviving devisees.

* *Seemle*, that if necessary or in the devise over might have been read *and*.

THE following case, in substance, was stated for the opinion of the Court, without any pleadings:—

CASE.

William Farrell was in his lifetime, and at the time of his death, the owner in fee-simple of (amongst other lands) the lands in question in this cause. The case turned upon the construction of his will, made on the 17th of July, 1861, of which the following are the material parts:

"I will and devise that all my just debts, funeral and testamentary expenses, be paid by my executors as soon as conveniently may be after my decease; and as to my worldly estate wherewith it has pleased God to bless me, I give and dispose of the same as follows: I give and devise to my beloved wife Ann all lands and tenements that I now possess, for her use and benefit during her natural life, provided that she shall not have power to mortgage, alienate, or sell any of the property, except through some unforeseen accident, such as fire, or accident of that kind, in order to replace the buildings thus destroyed; and that she shall live in the house she now occupies during her life; and after her decease I will and devise to my eldest son John lot number twelve," &c. (describing the land in question).

Then followed separate devises of other lands to his sons and daughters, David, James, William, Richard, Eliza, and Mary, no words of inheritance being used. He requested that twenty-five acres of land mentioned be sold, and the proceeds lent out at interest to the best advantage until wanted by his wife; and the amount of a mortgage of certain property in the same way. He bequeathed his son James \$500 out of the sale of the twenty-five acres, and proceeded, "And I do also order and bequeath that my beloved wife shall have the sole control of all my goods and chattel property, and dispose of the same as she thinks fit at the time of her death. And in case any of the aforesaid legatees should die before he or she comes of age, or should die intestate, then and in such case his or her portion shall be equally divided among the remaining survivors. And I further order and request that my two daughters Eliza and Mary shall be sufficiently provided for in all necessities out of my estate so long as they live at home with their mother, until such time as they get married; and in case my beloved wife should die before my said daughters or either of them comes of age, then my son John shall take charge of them in the same way and on the same account as hereinbefore last mentioned."

The said William Farrell died on or about the 13th of September, 1861, without having revoked the said will, and leaving surviving him his wife Ann, and John, David, James, William, Richard, Eliza, and Mary Farrell, the devisees and legatees in the said will mentioned, his only children and heirs and heiresses-at-law, all of whom except John are living. Ann Farrell, the testator's widow, died on the 20th of January, 1864. John Farrell, the testator's eldest son, survived his father, and went into possession of the lands devised to him, being the lands in question in this cause, and died in possession on the 22nd of March, 1867, being then thirty years of age.

The said John Farrell died intestate, leaving a widow and the plaintiff, his only son and heir-at-law, him surviving.

The plaintiff is the heir-at-law of the said John Farrell,

and entitled to the possession of the said lands, unless upon the true construction of the said will, the said John Farrell having died intestate, the said lands passed under the limitation contained in the said will to the surviving brothers and sisters of the said John Farrell.

The question for the opinion of the Court is, whether upon the true construction of the said will, in the events which have happened, the said lands have passed to the surviving brothers and sisters of the said John Farrell.

If the Court shall be of opinion in the negative, then judgment shall be entered for the plaintiff to recover possession of the said lands and costs of suit.

If the Court shall be of opinion in the affirmative, then judgment of *nolle prosequi*, with costs of defence, shall be entered up for the defendant.

Leith, for the plaintiff, contended that by mere force of the expression "in case any of the aforesaid legatees should die before he or she should come of age," the fee would pass. Such expression was inconsistent with the idea of a mere life-estate passing, which must cease on death at any age; therefore the expression must refer to some other interest passing, viz., a fee, with an executory devise over on death under age—*Holmes v. Godson*, 2 Jur. N. S. 383; *Toovey v. Bassett*, 10 East 460; *Frogmorton dem. Bramstone v. Holyday*, 3 Burr. 1617; *Powell on Devises*, Vol. II. p. 395; *Jarm. on Wills*, Vol. II., 3rd ed., p. 351.—That John, the plaintiff's ancestor, might have been either chargeable personally, or the land devised to him might have been chargeable, with the burden of support of the daughters, and the possibility in either case would cause the fee to pass.—*Lloyd v. Jackson*, L. R. 1 Q. B. 571; *Doe Sams v. Garlick*, 14 M. & W. 708, per Parke, B.; *Doe dem. Stevens v. Snelling*, 5 East 87; *Matthews v. Windross*, 2 Kay & J. 406; *Doe v. Richards*, 3 T. R. 356.—That the expressed intention of the testator to give and dispose of his "worldly estate," shewed an intention not to die partially intestate, but to dispose of the whole fee as to the various portions

given to his children.—*Lloyd v. Jackson, supra*, S. C., L. R. 2 Q. B. 269.—The absence of words of inheritance in the devise to the children shewed no intention the fee should not pass, for such words were also wanting in the devise over to the “survivors,” where undoubtedly a fee would pass; and where the testator did not intend to give the fee, as in the devise to his wife, he expressly confined it to “natural life:”—That under Con. Stat. U. C. ch. 82, sec. 12, the plaintiff’s ancestor would take the fee unless an intention to the contrary appeared:—That the word “or” in regard to death under age or intestate, was to be read “and”—*Greated v. Greated*, 2 Beav. 621; and as both such events did not occur the devise over, even if valid as to intestacy, could not take effect. If the fee passed, the limitation over on intestacy was repugnant and void: *Holmes v. Godson, supra*; *Greated v. Greated*, 26 Beav. 621. It could not be contended that the devise to the children were for life, with power to appoint the fee by will—*Brook v. Brook*, 3 Sm. & Giff. 280.

Robert A. Harrison, contra, contended that there was an intention apparent in the will that the fee should not pass, as evidenced by the devise over in case of death or intestacy: that even though it should be considered that the fee passed immediately, it was liable to be defeated by the devise over in case of death under age or intestacy, which latter event happened. He referred to *Morris v. Lloyd*, 3 H. & C. 141; *Audsley v. Horn*, 26 Beav. 195; *Jarm. on Wills*, vol. I., p. 123, 129, 130, 173; *Browne v. Browne*, 3 Sm. & Giff. 568; *Cambridge v. Rous*, 25 Beav. 409; *Re Mid Kent R. W. Co., Ex parte Bate*, 11 W. R. 417; *McEnally v. Wetherall*, 15 Ir. C. L. R. 502; *Coltsman v. Coltsman*, Ib. 171; *Jarman v. Vye*, L. R. 2 Equ. 784; *Slaney v. Slaney*, 33 Beav. 631; *Barker v. Young*, Ib. 353; *Cooke v. Mirehouse*, 34 Beav. 27; *Seccombe v. Edwards*, 28 Beav. 440; *In re Kirkbride’s Trusts*, L. R. 2 Equ. 400; *In re Sanders’ Trusts*, L. R. 1 Equ. 675; *Doe dem. Stevens v. Snelling*, 5 East 87; *Doe dem. Sams*

v. *Garlick*, 14 M. & W. 98; *Barton v. Barton*, 3 K. & Johns. 512; *Powell v. Boggis*, 35 L. J. Chy. 472; *Hood v. Oglander*, 34 Beav. 513; *Burton v. Powers*, 3 K. & Johns. 170; *Haddelsey v. Adams*, 22 Beav. 266; *Goodtitle dem. Richardson v. Edmonds*, 7 T. R. 639; *Doe Candler v. Smith*, Ib. 531; *Doe dem. Jones v. Owens*, 1 B. & Ad. 318; *Doe dem. Clarke v. Clarke*, 1 C. & M. 39; *Doe Anderson v. Hamilton*, 8 U. C. R. 302; *Hopkins v. Brown*, 10 U. C. R. 125; *McIntosh v. Elliott*, 1 Grant, 440; *Christie v. Saunders*, 5 Grant 464; *Spence v. Spence*, 12 C.B. N.S. 199.

DRAPER, C. J., delivered the judgment of the Court.

This case has been fully and very well discussed. It does not, however, appear to us to be necessary to go over all the points argued, in order to arrive at a conclusion,

The testator, first of all, gives his widow all his lands and tenements "for her use and benefit during her natural life," and after her decease he wills and devises to his eldest son, John, a part of his lands, specifying the particular lots and parcels, but without any words of limitation. In like manner, though not in precisely the same words, he gives to each of his four other sons, David, James, William, and Richard, and his two daughters, Eliza and Mary, each a separate part of his lands. He further gives to his widow the sole control of his chattel property, with the power to dispose of it as she thinks fit at the time of her death. "And in case any of the aforesaid legatees should die before he or she comes of age, or should die intestate, then his or her portion shall be equally divided among the remaining survivors." He further "orders and requests" that his two daughters shall be sufficiently provided for in all necessities out of his estate so long as they live at home with their mother, or until such time as they get married; and in case his wife should die before the daughters both come of age, then her son John "shall take charge of them in the same way and on the same account as hereinbefore last mentioned."

The testator died on the 13th of September, 1861, leaving his wife and seven children him surviving; and the children,

John excepted, still survive. The mother died in January, 1864, and John took possession of the land devised to him, and died in possession on the 22nd of March, 1867, being then thirty years of age. He must consequently have been upwards of twenty-one when his father died. John died intestate, leaving a widow and an only son, his heir-at-law, the plaintiff, him surviving. The defendant claims that the lands devised to John by his father have vested in the surviving brothers and sisters named in the will.

In *Grey v. Pearson* (3 Jur. N. S. 823) the Lord Chancellor (Cranworth) says, "The rule which, in modern times more particularly, the Courts have been always anxiously inclined to follow, has been to adhere as rigidly as possible to the precise words that are found, whether in wills or in deeds, and to give to those words their natural ordinary meaning, unless by so doing it appears from the context that you are using them in a different sense from that in which the testator or the maker of the deed intended to use them, or unless by so using them you would be doing something which would manifestly tend to an inconsistency, which could not have been the intention of the party making the instrument."

This rule must in construing a will be applied with due reference to the 12th sec. Cons. Stat. U. C. ch. 82, which directs that wherever land is devised it shall be considered that the deviser intended to devise all such estate as he was seised of in the land, whether in fee simple or otherwise, unless it appears on the face of the will that he intended only to devise an estate for life, or other estate less than he was seised of at the time of making the will.

Now in the present case a perusal of the whole will indicates no intention to give less than a fee simple to the testator's children. In regard to his wife he plainly limits the devise to her to a life estate, and after her decease he disposes of his land without such or indeed without any expressed limitation.

The very expression which gives rise to the present controversy shews an intention to provide against leaving any contingency unprovided for. When he intended to limit a

life-estate he used the proper terms for that end ; and comparing the two forms of expression used in the devise to the mother and that to the children, we find a clearly expressed intention to give less than a fee simple to the one, and no expression indicating that he did intend to give a less estate than he was seised of in the other. It is after this disposition that the passage occurs, "in case any of the aforesaid legatees should die before he or she comes of age, or should die intestate, then his or her portion shall be equally divided among the remaining survivors."

The construction for which the defendant contends is, that although a son or daughter might die leaving a child or children, yet unless the parent devised his or her share of the estate, it would go over, under this clause of the testator's will. To put an extreme case, if all but one of the testator's children attained the age of twenty-one years, and then died intestate, leaving children, the one survivor would take the whole estate.

In our opinion the will gave an absolute interest to each of the children attaining the age of twenty-one on the death of the mother, and not, as has been argued, a mere estate for life. The limitation to each such child is immediately connected *with* and commenced immediately *on* the expiration of that life-estate in the mother. Their estate could not be dependent on the contingency of their not dying intestate. Besides, while under age none of them could make a valid will, and as the estate of him or her who died under twenty-one would go over, the alternative to prevent its going over, namely, devising it, could not arise. We think, that if in any case the word "or" should be read "and," as in *Fairfield v. Morgan* (in Dom. Proc. 2 N. R. 38), this case would justify such a reading, and then the double event, dying under twenty-one and intestate, not having happened, the devise over fails.

In many of the cases in which this question, of reading "and" for "or" or *vice versa*, has arisen, failure of issue has been one of the events on which the devise over depended, and the enquiry has been whether by failure of issue was meant,

that the party taking the estate never had issue, or left no issue him surviving. The words on which the present contest has arisen leave no opening for a similar discussion, and must either give effect to the devise over, or be treated as repugnant to the preceding gift, in which case there is no necessity to resort to the doctrine of *Fairfield v. Morgan*. (*Vide Secombe v. Edwards*, 6 Jur. N. S. 642).

We do not rest our opinion in favour of the plaintiff, however, on that doctrine, but on the ground that John Farrell being twenty-one at the time of his father's death, took an absolute vested interest in remainder expectant on his mother's death. The right to devise is absolutely recognized by the words "or should die intestate," and the power to devise is nowhere expressly given, except by treating the devise to each child attaining twenty-one, and so legally competent to devise, as vesting the remainder absolutely in such child. To hold that the words "or should die intestate" cut down this gift, is to say that unless the devisee dispose of the fee in a particular mode, he shall be held never to have taken it.

We do not question that words in a will in themselves sufficient to pass a fee may be cut down by subsequent words which shew that the testator's intention was not to give the inheritance (*Barker v. Barker*, 2 Sim. 249, is an instance), but here the subsequent words do not affect the vesting of the inheritance, but only one of the modes by which it may be conveyed away. The testator could not have intended any such inconsistency with his previous absolute gift, or be presumed to have disinherited, not his son John but his child and heir, because John did not devise the land to him, but left it to descend by the operation of law.

The case of *Holmes v. Godson*, cited by Mr. *Leith* (8 DeG. Mac. & G. 152, S. C. 3 Jur. N. S. 383) appears to us conclusive in the plaintiff's favour. There the testator gave real and personal estate in trust for his son to vest on his attaining twenty-one, and directed that in case his son should not live to attain that age, or having attained it should not have made a will, the property should go over.

The son attained the age of twenty-one and died intestate. The Lord Justices, Knight Bruce, and Turner, held that the gift over was void for repugnancy, being a gift over in the event of the intestacy of a devisee in fee, and that the son took the real estate absolutely. *Lightburne v. Gill* (6 Br. P. C. 36); *Muschamp v. Bluet* (J. Bridgm. 132), and *Gulliver v. Vaux* (8 DeG. Mac. & G. 167,) were referred to in support of the conclusion.

We think our judgment should be for the plaintiff.

Judgment for plaintiff.

BENJAMIN V. THE CORPORATION OF THE COUNTY OF ELGIN.

Taxes—Money paid under protest—Right to recover back.

Certain lands were sold by the Crown to B., in 1853, which sale was cancelled in 1866, and the same lands sold to the plaintiff, to whom the patent issued. The land, it was admitted, had been legally assessed for certain taxes for 1863, 4, and 5. The plaintiff, on application to the County Treasurer, ascertained the amount due and paid it, stating that he did so under protest and without prejudice to his rights; but no demand had been made, nor any pressure exercised or threatened to compel such payment.

Held, that the money so paid could not be recovered back.

THIS was an action upon the common counts to recover \$238.65

Pleas—Never indebted, and payment.

The cause came on to be tried at the last assizes in and for the County of Middlesex, before the Chief Justice of Upper Canada, when a verdict was taken for the plaintiff for the amount claimed (\$238.65) subject to the opinion of the Court.

An extract from the clergy sale books of the Crown Lands Department, of certain sales made by the Crown in the year 1853, of clergy lots of land situate in the township of Aldborough, and of a re-sale of the same lots in the year 1866, was produced and proved, shewing that certain lots in the township of Aldborough were sold to H. C. R. Becher

in 1853: that such sales were cancelled by order of the Commissioner on the 24th February, 1866, and the same lands sold to the plaintiff on the following day.

An extract from the wild land tax book of the Treasurer of the County of Elgin, shewing the assessment of said lots for the years 1863, 1865, and 1866, was also produced and proved.

It was thereupon admitted as follows:

1. That the lands mentioned in the first mentioned extract were sold to H. C. R. Becher in the year 1853, and that the County Treasurer received notice of such sales from the Commissioner of Crown Lands, according to the Assessment Act then in force.

2. That the lands were legally taxed and assessed for county and municipal purposes, as shewn by the last mentioned extract for the years 1863, 1864, and 1865.

3. That the sale of lands mentioned in first mentioned extract was cancelled by order of the Commissioner of Crown Lands on February 24th, 1866.

4. That on February 25th, 1866, the said lands were sold to Henry Benjamin, the above-named plaintiff, and letters patent issued to him direct from the Crown.

5. That the plaintiff, on application to the Treasurer, ascertained that there was due for taxes on said lands the sum of \$238.65, and the Treasurer gave a statement to that effect.

6. That the plaintiff paid said amount to the County Treasurer of said County of Elgin, through his attorney, William Elliott, Esquire, on the 26th April, 1866, who at the same time stated that he paid the same on behalf of the said Henry Benjamin under protest, and without prejudice to the right of the said Henry Benjamin to recover the same back.

7. That no demand was made by the defendants, or any person on their behalf, nor was there any pressure exercised or threatened to compel or enforce payment of said taxes by the plaintiff, except by giving the statement mentioned in paragraph number five.

8. That the Council of said County was petitioned for a

return of said amount by the plaintiff, and the prayer of said petition was refused.

The question for the opinion of the Court is, whether the plaintiff is, under the facts stated, entitled to sue the defendants for said sum of \$238.65, and recover the same, under all or any of the counts in the declaration.

If the Court shall be of opinion in the affirmative, then the verdict entered for plaintiff for \$238.65 is to stand; but if the Court shall be of a contrary opinion, then a nonsuit is to be entered.

Robert A. Harrison for the plaintiff, cited *Ryceman v. Van Voltenburgh*, 6 C. P. 385; *Orser v. Vernon*, 14 C. P. 585; *Charles v. Dulmage*, 14 U.C.R. 585; *Steele v. Williams*, 8 Ex. 625; *Traherne v. Gardner*, 5 E. & B. 913; *Atkinson v. Denby*, 7 H. & N. 934; *Corporation of Haldimand v. Martin*, 19 U. C. R. 178; *Fraser v. Pendlebury*, 31 L. J. C. P. 1, S. C., 10 W. R. 104; *Street v. Corporation of Kent*, 11 C. P. 255, S. C. in Appeal, 2 E. & A. Rep. 217.

Moss, contra, cited *Nicholson v. Gooch*, 5 E. & B. 999; *Collins v. Brook*, 5 H. & N. 700; *Secretary of War v. City of Toronto*, 22 U. C. R. 556; *Atlee v. Backhouse*, 3 M. & W. 650; *Skeate v. Beale*, 11 A. & E. 983.

HAGARTY, J., delivered the judgment of the Court.

It is admitted in the case stated, that the lands were legally taxed and assessed for municipal purposes for the years 1863, 4, and 5, according to an extract copied from the Treasurer's books: that said lands had been sold by the Crown to Mr. Becher in 1853, and the Treasurer received notice of such sale according to the Assessment Act then in force. The nature of this sale to Becher is not stated.

It then appears that this sale was cancelled in 1866, and the lands granted by patent to the plaintiff. It is not stated whether there was any bargain or privity between Becher and the plaintiff.

Thus far, then, we have admission that certain arrears of taxes appeared against these lands in the Treasurer's books

at the time the plaintiff acquired his title in fee simple, and that the lands had been legally assessed for these taxes for three preceding years.

The plaintiff, for some unexplained reason, is stated to have gone to the Treasurer's office and ascertained the amount of these arrears, and received the statement of the amount.

That the plaintiff, through his attorney, either then or afterwards paid the amount mentioned in the statement to the Treasurer, stating at the same time that he paid the sum for the plaintiff under protest, and without prejudice to the plaintiff's right to recover it back.

It is then admitted that no demand was made by defendants, or any one on their behalf, nor was there any pressure exercised or threatened, to compel or enforce payment by plaintiff of these taxes, except giving the statement already referred to.

Defendants were afterward petitioned to refund the money, but refused.

It may be that there were some other facts in the case not stated to us, which might furnish some reason for the wholly unexplained conduct of the plaintiff in paying this money.

If not legally liable to pay it, why did he do it? Nothing is alleged as to any mistake of either law or fact.

We cannot assume, in the absence of evidence, that defendants were about to commit any act illegal as to the plaintiff, or to sell his lands contrary to law. The case expressly states that nothing of the kind was threatened or suggested.

The defendants, as far as we can see, have done nothing illegal. They have, it is admitted, duly and legally assessed these lands for the taxes for these three years. A person proving himself to have recently acquired title comes and ascertains the amount due, and afterwards, without threat or pressure, or even demand, pays it.

Unless we are prepared to hold that the mere fact of saying that money is paid under protest is alone always sufficient to entitle the payer to recover it back, we see nothing to support his claim. There is nothing inequitable or contrary to good conscience in defendants receiving from this

plaintiff, as owner of this land, arrears of taxes legally assessed thereon. On this point we refer to the remarks of the present Chief Justice of the Common Pleas in *Street v. The Corporation of Simcoe* (12 C. P. 292) where the law is very fully reviewed, and this point in particular fairly disposed of.

If the defendants here were asserting a claim on the plaintiff, or threatening to sell the land for the arrears, the case would be wholly different. All they did was to state the amount charged in their books against the land, and this it is admitted was legally so charged. It is quite consistent with all the facts stated, that the plaintiff got these lands from the Crown on condition of his paying the arrears of taxes, or that Becher consented to the cancellation of his claim in consideration of the plaintiff paying these arrears, or relieving him from some liability in respect thereof. These are of course mere assumptions, but they are equally deducible from the evidence as any conclusions on which a right to recover back this money can rest.

We do not think that a man can rest an action merely on the fact of his paying money under protest.

We have examined all the cases cited, but can find none in point to support the plaintiff's contention.

We therefore think that the *postea* must be delivered to defendants.

Judgment for defendants.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM TRINITY TERM, 30 VICTORIA, TO EASTER TERM, 30 VICTORIA.

ABSCONDING DEBTORS.

*Practice—C. S. U. C. ch. 25.]—*The plaintiff had sued out an attachment against defendant as an absconding debtor, and went down to the County Court to prove his claim, upon a record shewing interlocutory judgment signed for want of a plea. Defendant applied to have a plea of never indebted put on the record, on the ground that such plea had been filed before signing the judgment.

Held, affirming the judgment of the County Court, that the application was rightly refused, for defendant should have moved against the judgment if irregular; and he had no right to plead until he had put in special bail.

Held, also—reversing such judgment, *Draper*, C.J., doubting—that although defendant had not put in special bail, his counsel should have been allowed to cross-examine the plaintiff's witness, and give evidence in mitigation of damages. —*Offay v. Offay*, 363.

ACCORD AND SATISFACTION.

See MONEY PAID.

ACTION.

1. *Maliciously procuring proceedings in Chancery—Interfering with plaintiff's business—Right of action for—Pleading.]—*The first count of the declaration alleged that the plaintiff was an hotel keeper at Niagara Falls, and furnished guides and dresses to persons going under the Falls, and by consent of the Government had a stairway for visitors down the bank of the river; that the defendants also had a stairway for the same purpose; that the plaintiff's stairway had been burned down, and while he was rebuilding it, the defendants, contriving to injure him, falsely and maliciously, and without reasonable or probable cause, represented to the Attorney-General that the land on which the plaintiff's stairway was built (which belonged to the Crown) was necessary for military purposes, and that the land on top of the bank was

required for a highway, and had so been used for many years by license from the Crown, and that the plaintiff had wrongfully intruded on said land, and had begun to excavate and destroy the cliff at the top of the bank, reducing the width of the road; and thereby the defendants induced the Attorney-General to permit the use of his name in filing an information in Chancery to restrain the plaintiff, and obtained an injunction against the plaintiff to restrain him, from interfering with the bank; whereby the plaintiff was delayed in completing his stairway until he obtained a license from the Crown so to do, and lost the profits of his business, &c.

The second count alleged that the plaintiff and defendants were both engaged in furnishing refreshment and dresses to persons wishing to go under the Falls; that there was a certain public stairway for such persons down the bank; that the defendants intending to injure the plaintiff, falsely and maliciously, and without reasonable or probable cause, represented to the public wishing to go down the stairway that they had a right to prevent them, and forbade and refused to allow persons wearing dresses furnished by the plaintiff to pass down, by reason whereof hundreds of persons who would have procured dresses from the plaintiff, were forced and obliged to get their dresses from the defendants, and the plaintiff lost the profits of hiring his dresses and selling refreshments, &c.

Held, on demurrer, that both counts were bad; for as to the first no action would lie so long as the decree in equity remained in force, notwithstanding the subse-

quent license from the Crown; and as to the second, it charged no violation of any right of the plaintiff, nor the maliciously procuring the breach of any contract with him, and it therefore shewed no cause of action.—*Davis v. Barnett et al.*, 109

2. *Water Course—Action for obstructing—Injury to plaintiff's right—Right to recover, though no damage proved.*—The plaintiff declared that he was entitled to the water of a certain stream for working his mill, and complained that defendant, owning a mill higher up, had unlawfully deposited sawdust, bark, &c., in the stream, which was carried down and choked up the plaintiff's mill pond and races, &c. Defendant by his second plea denied the plaintiff's right to the water, which the plaintiff sufficiently proved, but there being no appreciable damage, the jury found a general verdict for defendant.

Held, that there must be a new trial, for the right being established, the deposit of sawdust, &c., was an injury to it, for which the plaintiff was entitled to a verdict.

When an act done would be evidence against the existence of a right, it is an injury to such right, for which the party injured may sue.—*Mitchell v. Barry*, 416.

3. *Misrepresentation—Action for—Pleading—Uncertainty.*—Declaration, that the defendants owning the land upon which the Provincial Exhibition was to be held, advertised that certain portions would be let by auction for the purpose of refreshment booths: that the plaintiff attended and leased one of such portions: that at the said auction the defendants made certain statements and representations as to the

positions of the gates and entrances to the Fair grounds, the number of persons to be allowed to sell refreshments, and the relative positions of the booths, on which the value of the plaintiff's letting was estimated and depended, and relying on which the plaintiff purchased and erected a booth; but that the defendants deviated and departed from such representations, and so changed the position of the gates, and the number of the booths, that the plaintiff's letting became useless to him.

Held, that no cause of action was shewn, for the declaration was for a wrong, and the statements were not alleged to have been false when made, or to have been made in order to induce the plaintiff to contract.

Semble, that the declaration was also bad, in not stating what the representations were, and how departed from.—*Reid v. The Board of Agriculture for Upper Canada*, 565.

ADJOURNMENT.

Power of, in Quarter Sessions, on hearing of Appeal.—See APPEAL.

ADMISSIONS.

By Pleading.—See DOWER, 1.

AFFIDAVIT.

1. *Rule nisi—Practice.*—Affidavits impeaching the character for veracity of a deponent whose affidavit had been filed on moving a rule, were rejected.—*Clark v. Chipman*, 170.

2. Remarks as to the practice of magistrates or commissioners taking unauthorised affidavits.—*Jackson v. Kassel*, 341.

Entitling of.—See EJECTMENT, 1.—MUNICIPAL CORPORATIONS, 3.

See CRIMINAL LAW, 3, 4, 6.

AGENT.

See PRINCIPAL AND AGENT.—DEED, 1.—LIMITATIONS (Statute of) 2.

ALTERATION

Of deed.—See DEED, 1.

AMENDMENT

Of notice of title.—See EJECTMENT, 3.

ANNUITY.

See WILL, 1.—DOWER, 2.

APPEAL.

Summary conviction—Appeal.—Under Consol. Stat. U. C. ch. 114, an appeal from a conviction must be heard at the Court of Quarter Sessions appealed to. There is no power of adjournment.

Where therefore such Court, after proof of entry and notice of the appeal, adjourned the further hearing, by order, until the next sittings, and then made an order quashing the conviction, the orders were quashed. No costs were given, as no objection had been made at the time of adjournment.—*In re McCumber and Doyle*, 516.

From Judge's order.—See PRACTICE, 1.

See COUNTY COURT, 2.—QUARTER SESSIONS—TAXES, 1.

ARBITRATION AND AWARD.

See BOUNDARY LINE COMMISSIONERS.—DEED, 1.

ARREST.

See MALICIOUS PROSECUTION.

ASSAULT.

See CRIMINAL LAW, 8.

ASSESSMENT.

See TAXES.

ASSESSMENT OF DAMAGES.

See JUDGMENT NON OBSTANTE VEREDICTO.

ASSETS.

See EXECUTORS, 3.

ASSIGNMENT

Of debt.—*See* ATTACHMENT OF DEBTS.

Of Policy, proof of.—*See* INSURANCE, 5.

ASSURANCE.

See INSURANCE.

ATTACHMENT OF DEBTS.

Practice—*Notice to judgment debtor.*—An order on garnishees to pay over having been made upon a summons of which the judgment debtor had no notice, it appeared, on application to rescind such order, that the debt had been assigned before the attaching order, and that the garnishees had notice of such assignment before the summons was served on them, to which they did not appear, and before they paid over the money under the order. Under these circumstances the order was rescinded, with costs to be paid by the judgment creditor, who it appeared was also aware of the assignment.

Notice of an application to garnish should always be given to the judgment debtor; but *Quære*, whether it can be imposed as a condition on the judgment creditor, the Statute not requiring it.

It was alleged, but held not sufficiently proved, that the judgment debtor was insolvent when he made the assignment; and *Quære*, whether the judgment creditor could set that up.—*Ferguson v. Carman*—*The Corporation of the County of Frontenac, Garnishees*, 26.

AUTREFOIS ACQUIT.

See CRIMINAL LAW, 9.

BAILEE.

See TROVER.

BANK.

Liability of for torts of their agent.—*See* PRINCIPAL AND AGENT.

See USURY.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note*—*Endorsement over-due*—*Agreement to give time.*—Action by the endorsees against the maker of a note payable to J. W., by him endorsed to G. W., and by G. W. to plaintiffs. *Plea*, that J. W. endorsed the note to G. W. for safe-keeping only, and not to be negotiated, and G. W. so received it; but after it fell due, and without J. W.'s authority, he endorsed it to the plaintiffs, who then had notice of the premises; and that while J. W. held it, and after it fell due, he,

for value, gave time to defendant for payment until a day after the commencement of the suit. *Held*, after verdict, a good plea.

A valid agreement to give time is an equity which attaches to a bill as against a person taking it after maturity.—*Britton et al v. Fisher*, 338.

2. A note signed by two, beginning "I promise to pay," is joint and several.—*Creighton v. Fretz et al*. 627.

See EXECUTORS 1, 2.—LIMITATIONS (Statute of) 2.—USURY.

BOND.

Alteration of.—See DEED, 1.

BOUNDARY LINE COMMISSIONERS.

Evidence and effect of their proceedings.—The point in dispute being the boundaries of the N.E. quarter of lot 21, it was sworn that there were no original posts between 20 and 21, nor at lot 19; and the plaintiff then offered to prove that a requisition had been made to the Boundary Line Commissioners to settle the line between 19 and 20, by the parties interested therein, and that they did so, and planted monuments; but as no award had been filed, and no record of the proceedings could be found, he relied upon oral testimony only, and upon acts and work on the ground.

Held, inadmissible; for 1. There was nothing to shew that the documents required had ever been drawn up, so as to let in the secondary evidence; 2. The owner of 21,

not being necessarily interested, would not be bound by the award, unless a party to the proceedings, of which no proof was offered; and, 3. Posts between 19 and 20, if planted by the Commissioners, would not be equivalent to original posts, by which the site of the lost monument, shewing the boundary of 21, could be determined.

The omission to file the award, if the evidence had been in other respects sufficient, would not have been fatal.—*Barr v. The Canada Life Assurance Company*, 614.

BY LAW.

See MUNICIPAL CORPORATIONS.

CARRIERS.

Common carriers — Evidence — Liability.—In an action against defendants as common carriers, the plaintiff proved a receipt signed by them contracting to carry on certain conditions, and that they had carried fish for one witness called, as well as for the plaintiff, on an arrangement made by their agent in their office for a month. This witness also said the other fishermen in Goderich had arrangements with defendants for the carriage of fish. *Held*, some evidence that defendants were common carriers; and that, if so, they were liable to an action at common law for refusing to carry except upon conditions limiting their common law liability.

Held, also, that to support such action it must be shewn that the plaintiff tendered the goods to be carried, as well as the fare.

Held, also, that the contract to be inferred from the evidence, stated

in the case, was a limited not a general one as declared upon.]—*Leonard v. The American Express Company*, 533.

Contract to Carry—Measure of Damages.]—See DAMAGES, 2.—RAILWAY COMPANIES, 2.

See RAILWAY COMPANIES.

CERTIORARI.

Replevin — Certiorari — Mandamus.]—A. brought replevin in the County Court and obtained a verdict, which was set aside because title to land came in question. Nothing was said in the rule about a new trial, but he served another notice of trial, and the cause was made a *remanet*. The surety being sued in this Court on the replevin bond for not prosecuting the suit with effect, moved for a *mandamus* to compel the County Court to proceed with the action, or a *certiorari* to remove it, and in the meantime to stay proceedings in this Court; but the Court refused to interfere.

Semble, that a *certiorari* imports jurisdiction in the inferior Court, and will not lie to determine whether it exists, at least not at the instance of the plaintiff who sued there.

23 Vic. ch. 44, prohibits a *certiorari* unless the debt or damages claimed exceed \$100. *Quære*, therefore, whether replevin is within the act.

The *mandamus* was refused, among other reasons, because the applicant had a remedy by appeal from the rule in the county court setting aside the verdict.—*Meyers et al. v. Baker*, and in a cause in the County Court, *Hargreaves v. Meyers et al.* 16.

CHAMBERS.

Judge at Nisi Prius acting as Judge in.]—See EJECTMENT, 3.

Appeal from Judge's order.]—See PRACTICE, 1.

CHANCERY.

Maliciously procuring proceedings in—Action for.]—See ACTION.

CLERGYMAN.

See CRIMINAL LAW, 3.

CLERK OF THE PEACE.

Fees.]—The table of fees established and promulgated by the Courts contains all the services for which Clerks of the Peace are entitled to charge, in addition to such as are specially authorized and provided for by any Statute. No local tariff or user in particular counties can give any additional right.

Where the Quarter Sessions have audited the account of such Clerk, this Court will not interfere by *mandamus* to compel the allowance of particular items.—*In re Dartnell and the Quarter Sessions of Prescott and Russell*, 430.

COMMISSION TO EXAMINE WITNESSES.

1. *Evidence taken under Commission in U.C.—Proof of Examination—C. S. U. C. ch. 32, secs. 19, 21.*]—Consol. Stat. U. C. ch. 32, secs. 19, 21, authorizes the examination of aged or infirm persons under commission within, or of any persons out of, Upper Canada, but provides for proof and reception of such latter examination only.

Held, that an examination within Upper Canada was clearly, by

necessary intendment, made receivable when duly taken, which in this case was proved by the Commissioner.—*Ryan v. Devereux*, 100.

2. *Misnomer of Commissioner.*—

A commission to examine witnesses was addressed to Samuel B. *Henry* and William J. Gibson, of Philadelphia, jointly and severally. Gibson took no part in executing it, but all was done by one Samuel B. *Huey*, and an affidavit of the plaintiff's counsel at Philadelphia, taken before Gibson, explained that Huey was the name forwarded by him to the plaintiffs' attorney here, but though some clerical error it was directed to Henry: that he knew no such person as Samuel B. Henry in Philadelphia, but that the Huey before whom the depositions were taken was the person intended.

This objection was not taken to the commission at the trial, though others were, and the evidence of witnesses on both sides taken under it was read.

Held, *Hagarty*, J., dissenting, that nevertheless the objection was fatal, for the depositions being taken without authority were not in fact depositions, and the execution of the commission was a nullity.

Per Draper, C.J.—It will be very desirable to adopt the suggestion in *Grill v. General Iron Screw Collier Company*, L. R. 1 C. P. 600, and to leave all merely technical objections to be taken advantage of by motion in Chambers, giving effect at *Nisi Prius* only to the absence of what our Statute makes conditions precedent to the use of the depositions.—*Lodge v. Thompson*, 588.

COMMISSIONERS OF POLICE.

See LICENSES TO SELL LIQUORS, 1.

COMMON COUNTS.

See SALE OF LAND.

COMMON SCHOOLS.

See SCHOOLS.

CONFLICT OF LAWS.

Contract made in Chicago—Conflict of laws—Statute of Frauds—Agency.—A contract for the sale of goods to the plaintiffs at a certain price, payable in Toronto, was made by the defendant at Chicago, through his agent there, the goods to be shipped by the Grand Trunk Railway from Toronto. No sold note was signed by the broker until after action brought for the non-delivery; but it was proved that the 17th section of the Statute of Frauds was not in force in Illinois. *Held*, that the contract, being valid where it was made, could be enforced here, though not in writing.

Held, also, that the evidence sufficiently proved the agent's authority to act for the defendant.—*Green et al. v. Lewis*, 618.

CONTRACT.

Construction—Independent covenants—Equitable plea.—Declaration on a deed, by which, in consideration of \$1, the defendant assigned to the plaintiff one-fourth share in an invention, for which he was applying for a patent in the United States, and covenanted to assign to him the same share in such letters patent to be issued; in consideration whereof the defendant covenanted to use his best endeavours to bring said patent into general use in the United States. Breach, that after

the patent had been obtained, the defendant would not assign to the plaintiff, but wrongfully sold his whole interest to others.

Plea, on equitable grounds, that the real consideration, as the plaintiff well knew, was not the \$1, but the plaintiff's covenant to endeavour to bring the patent into use in the United States: that the plaintiff wholly neglected to use any exertion for that purpose, but, on the contrary, did, before the sale by the defendant of his right, undervalue and speak against the invention, and refused to allow it to be used in a railway of which he was manager; that the defendant was induced to enter into the agreement solely on account of the plaintiff's position and ability to serve the defendant by his recommendations, and his conduct as aforesaid had been very prejudicial to the invention. And so the defendant said, that before any breach on the defendant's part, and before any sale by him, the plaintiff withdrew from and broke his agreement, whereby the consideration for the defendant's agreement wholly failed.

Held, on demurrer, no defence; for the two covenants were independent; the plaintiff was entitled to a transfer as soon as the patent issued, and the non-performance by him of something to be done afterwards could not defeat his right of action.]—*Stovin v. Dean*, 600.

See ACTION, 3.—CARRIERS—CONFLICT OF LAWS—DAMAGES, 2.—RAILWAY COMPANIES—SALE OF LAND.

CONVERSION.

See PARTNERSHIP, 2.—PRINCIPAL AND AGENT—TROVER.

CONVICTION.

See APPEAL—QUARTER SESSIONS.

CORPORATIONS.

See RECTORS—STOCK.

COSTS.

1. The defendant's counsel told the jury that a verdict in favor of the plaintiff for any sum would carry costs. *Quære*, as to the right to make such statement; but *semble*, that the objections to a verdict for the plaintiff founded upon it, would apply equally to a verdict for defendant.—*Carrick v. Johnston*, 69.

2. *Issues in law and fact*—C. L. P. A. secs. 316, 324, 328.]—In an action on the case, the plaintiff had judgment on demurrer to some of the pleas. He afterwards obtained a verdict for 1s. damages on the issues in fact, and a certificate for costs was refused.

Held, that under C. L. P. A. sec. 316, he was entitled to his full costs of the demurrer, and that sec. 328, did not apply.—*Kinloch v. Hall*, 134.

See COUNTY COURT, 2.—DEMURRER.—DOWER, 1.—STAYING PROCEEDINGS.

COUNTY COURT.

1. *Jurisdiction*.]—Upon the evidence in the County Court it appeared that the plaintiff, under the common counts, was claiming an amount of \$771, reduced to \$304 by credit given, but not by payment or by set-off agreed to be taken as payment. *Held*, that the \$304 was not an amount liquidated or ascertained by the act of the parties, and

that the claim therefore was beyond the jurisdiction.

A plaintiff cannot by giving credit for a set-off compel defendant to set it up, or give the County Court jurisdiction.—*Furnival v. Saunders*, 119.

2. *Appeal—Bond, construction of*—*C. S. U. C. ch. 15, sec. 68.*—*R.*, being plaintiff in the County Court, appealed to this Court, giving a bond to the defendant *W.*, as required by the Statute, to abide by the decision of this Court of the cause, and “to pay all such sums of money and costs, as well as of the said suit as of the said appeal, as should be awarded and taxed to said *W.*” The appeal having been dismissed, *W.* recovered judgment in the Court below. *Held*, affirming the judgment of the County Court, that the bond compelled *R.* to pay *W.*’s costs of defence taxed there, not merely the costs of appeal.

Where the decision of the Court appealed to in effect sustains a judgment of the County Court, which disposes of the cause in the respondent’s favor, or directs a proceeding or judgment which has that effect, the bond is a security for any debt or damages awarded, and for the costs of the cause as well as of the appeal.—*Waddell v. Robertson, et al.*, 376.

See CERTIORARI—PROHIBITION—STAYING PROCEEDINGS.

COVENANTS FOR TITLE.

Dower — Encumbrances.] — Declaration on defendant’s covenant to convey certain land to plaintiff,

free from encumbrances, assigning as a breach that the land was, at the date of the covenant, subject to a claim for a dower in favor of one *R.*, the wife of one *J.*, a former owner of said land, the said *R.*, never having released her right to dower therein,

Held, bad on demurrer, for it could not be assumed that *J.*, was dead at the date of the covenant, and the inchoate right to dower would not be an encumbrance within the covenant.

Thornhill v. Jones, 12 U. C. R. 231, and *Dack v. Currie*, *Ib.* 334, followed.—*Wilson v. Biggar*, 85.

COVENANTS.

Liability of assignee of lease.]—See LANDLORD AND TENANT.

See CONTRACT—SHERIFF, 3.

CRIMINAL LAW.

1. *False Pretences—Consol. Stat. C., ch. 92. sec. 71.*]—An indictment for obtaining from *A.* \$1200 by false pretences, is not supported by proof of obtaining *A.*’s promissory note for that sum, which *A.* afterwards paid before maturity.

The term “valuable security,” used in *Consol. Stat. C. ch. 92. sec. 72*, means a valuable security to the person who parts with it on the false pretence; and the inducing a person to execute a mortgage on his property is therefore not obtaining from him a valuable security within the act.]—*The Queen v. Brady*, 13.

2. *Attempting to commit a felony—Aiding such attempt*—27–28 *Vic., c.*

19, s. 9.]—The prisoner was convicted of unlawfully attempting to steal the goods of one J. G. It appeared that he had gone out with one A. to Cooksville, and examined J. G.'s store with a view of robbing it, and that afterwards A. and three others, having arranged the scheme with the prisoner, started from Toronto, and made the attempt, but were disturbed after one had got into the store through a panel taken out by them. Prisoner saw them off from Toronto, but did not go himself.

Held, that as those actually engaged were guilty of the attempt to steal, the prisoner, under 27-28 Vic., ch. 19, sec. 9, was properly convicted.—*Regina v. Esmonde*, 152.

3. C. S. U. C. ch. 98—*Fenian raid—Prisoner a citizen of United States, and a natural-born subject—Proof of citizenship—Evidence of acts charged, levying war, being in arms, &c.—Effect of prisoner's presence as a clergyman only.*]—The prisoner was convicted upon an indictment under C. S. U. C., ch. 98, containing three counts, each charging him as a citizen of the United States. The first count alleged that he entered Upper Canada with intent to levy war against her Majesty; the second that he was in arms within Upper Canada, with the same intent; the third, that he committed an act of hostility therein, by assaulting certain of her Majesty's subjects, with the same intent.

The prisoner's own statement, on which the Crown rested, was that he was born in Ireland, and was a citizen of the United States. It was objected that the duty of allegiance attaching from his birth con-

tinued, and he therefore was not shewn to be a citizen of the United States—but, *Held*, that though his duty as a subject remained, he might become liable as a citizen of the United States by being naturalized, of which his own declaration was evidence.

Held, also, upon the testimony set out in the case, that there was evidence against the prisoner of the acts charged.

Held, also, that even if he carried no arms, on which the evidence was not uniform, yet being joined with and part of an armed body which had entered Upper Canada from the United States and attacked the Canadian volunteers, he would be guilty of of their acts of hostility and of their intent; and that if he was there to sanction with his presence as a clergyman what the rest were doing, he was in arms as much as those who were actually armed.

Held, also, that the affidavits tendered shew no ground for interference.

A rule *nisi* for a new trial was therefore refused. *Regina v. McMahon*, 195.

4. C. S. U. C. ch. 98—*Nationality of prisoner—Proof of citizenship—Effect of his presence as reporter only.*]—In this case, the charge being the same as in the last, it was shewn that the prisoner had declared himself to be an American citizen since his arrest, but a witness was called on his behalf, who proved that he was born within the Queen's allegiance. *Held*, that the Crown might waive the right of allegiance, and try him as an American citizen, which he claimed to be.

The fact of the invaders coming from the United States would be *prima facie* evidence of their being citizens or subjects thereof.

The prisoner asserted that he came over with the invaders as reporter only, but *Held*, that this clearly could form no defence, for the presence of any one encouraging the unlawful design in any character would make him a sharer in the guilt.

Held, also, that the affidavits afforded no ground for interference. —*The Queen v. Lynch*, 208.

5. *C. S. U. C. ch. 98—Indictment—Several counts—Election.*]—The prisoner in this case was indicted on two sets of counts, one charging him as a citizen of the United States, the other as a subject of her Majesty. The learned Judge at the trial refused to put the Crown to an election between the two sets of counts, and the Court upheld his ruling. —*Regina v. School*, 212.

6. *Inciting to make false affidavit—Venue.*]—Attempting to bargain with or procure a woman falsely to make the affidavit provided for by *C. S. U. C. ch. 77, sec. 6*, that A. is the father of her illegitimate child, is an indictable offence.

The attempt proved consisted of a letter written by defendant, dated at Bradford, in the County of Simcoe, purporting but not *proved* to bear the Bradford post mark, and addressed to the woman at Toronto, where she received it. *Held*, that the case could be tried in York.

Semble, per *Draper, C. J.*, if the post mark had been proved, and the letter thus shewn to have passed out of defendant's hands in Simcoe,

intended for the woman, the offence would have been complete in that County, and the indictment only triable there.

Per Hagarty, J., the defendant in that case would still have caused the letter to be received in York, and might be tried there.

Quære, whether, if the woman had committed the offence, it should have been charged as a misdemeanour only, or as the statutory offence of perjury. —*Regina v. Clement*, 297.

7. *False Pretences.*]—On an indictment for obtaining money by false pretences, it appeared that G., the prisoner, and another, were in a boat on the bay, and the prosecutor, M., agreed with them to take him to meet the steamer, G. saying the charge would be 75 cents at the steamer. The prosecutor, according to his own account, took out a \$2 bill, saying he would get it changed. Prisoner said "I'll change it," upon which the prosecutor handed it to him, and he shoved off with it. Other witnesses represented the prisoner's statement to be that he had change. The prosecutor did not say what induced him to part with the money.

Held, that a conviction could not be sustained. —*Regina v. Gemmell*, 312.

8. *Assault with intent to ravish—Insanity—Consent.*]—In the case of rape of an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent—*e. g.* that she was incapable, from imbecility, of expressing assent or dissent; and if she consent from mere animal passion, it is not rape.

In this case the charge was assault with intent to ravish. The woman was insane, and there was no evidence as to her general character for chastity, or anything to raise a presumption that she would not consent. The jury were directed that if she had no moral perception of right and wrong, and her acts were not controlled by the will, she was not capable of giving consent, and the yielding on her part, the prisoner knowing her state, was not an act done with her will. They convicted, saying she was insane and consented. *Held*, that the conviction could not be sustained.

On an indictment for attempting to have connection with a girl under ten, consent is immaterial, but in such a case there can be no conviction for assault if there was consent.—*Regina v. Connolly*, 317.

9. *Indictment under C. S. U. C. ch. 98—Plea, Autrefois Acquit.*]—The prisoner being indicted under Consol. Stat. U. C. ch. 98, and charged as a citizen of the United States, was acquitted on proving himself to be a British subject. He was then indicted as a subject of her Majesty, and pleaded *autrefois acquit*.

Held, that the plea was not proved, for that by the Statute the offence in the case of a foreigner and a subject is substantially different, the evidence, irrespective of national status, which would convict a foreigner, being insufficient as against a subject; and the prisoner therefore was not in legal peril on the first indictment.—*Regina v. Magrath*, 385.

See THEFT.

CUSTOMS.

See DAMAGES, 2—DISTILLERS.

DAMAGES.

1. *Trespass—Several defendants—Separate damages—Exemplary damages.*]—*Held*,—affirming the judgment of the Court of Queen's Bench,—that it was no ground for a new trial in an action of trespass against two defendants, that the jury had found separate damages, \$800 against one defendant, and \$400 against the other.

Quære, as to the proper mode of entering judgment on such verdict.

Held, also, one of the defendants having used insulting expressions to the plaintiff while being examined before him as a magistrate, that the learned Judge was justified in telling the jury they were at liberty to give exemplary or vindictive damages.—*Clissold v. Machell and Mosely*, 422. In Appeal.

2. *Contract—Measure of Damages.*—Defendant, a steamboat owner, agreed to carry certain wheat of the plaintiffs from Oshawa to a port in the United States, by the 17th of March, when, as the defendant knew, the Reciprocity Treaty would expire and an import duty be payable there. He failed to do so, and the plaintiffs having sent the flour afterwards, were compelled to pay a large duty, which they would have escaped by getting it there before the expiration of the treaty. *Held*, that such duty was recoverable as damages for the breach of contract; and that it was immaterial that prices rose in the States soon after the day fixed for delivery, so that the plaintiffs actually made

more, after paying the duty, than they could have done by selling it on that day.—*Gibbs et al. v. Gildersleeve*, 471.

Injury to a right—Right to recover for, though no damage proved.
—See ACTION, 2.

See DOWER 1—INSURANCE, 1, 3—
LANDLORD AND TENANT, 2—R. W.
Cos., 2—REPLEVIN 2.

DECEIT.

See ACTION, 3.

DECLARATIONS.

See EVIDENCE—INSURANCE, 5.

DEDICATION.

See HIGHWAY, 1.

DEED.

1. *Alteration—Estoppel.*]—A person who has executed a deed cannot be bound by an alteration made in his absence by his verbal direction.

Defendant having executed a bond conditioned for one H. performing an award, one of the referees refused to act, and another was proposed, to which defendant assented. The papers were sent to defendant's attorney to be changed, and the bond was altered but not re-executed. Defendant was made aware of the alteration, and attended with H. before the arbitrators, where he took an active part. The jury were told that if defendant verbally assented to the alteration being made by his attorney he was bound, though he

was not present and had not re-executed.

Held a misdirection.

Quære, whether upon the evidence, more fully stated in the case, defendant could be held estopped by his acts from disputing the bond so altered.

To bind a person to a deed altered out of his presence, and by his verbal directions only, the acts done should be unequivocal and consistent only with his positive assent. Here the arbitration could have been carried out without his being bound, and his attendance there was not as a principal. *Martin v. Hanning*, 80.

2. *Construction—Estate in fee or for a term of years—Livery of seisin.*—A. by indenture, in 1826, in consideration of the rents and covenants by M. to be paid and performed, "granted, demised, and to farm let to M., his heirs and assigns," certain land, *habendum*, "unto the said M., his heirs and assigns, from the day of the date hereof, for and during the term of twenty-one years," yielding and paying yearly during the said term to M., his heirs and assigns, the sum of 7s. 6d. There was a covenant by M. to pay rent, and by A. for quiet enjoyment during the term. At the end of the term M. gave up the lease to A. saying he had no further claim, but he was allowed to continue in possession upon no definite understanding, and defendant went in after him. Upon ejectment brought by the devisee of A., a verdict was directed for defendant, on the ground that the indenture passed the fee.

Held, that without livery of seisin

the fee simple granted in the premises could not take effect, and the *habendum* for twenty-one years would stand; but a new trial was granted to determine the fact of livery.

Semble, that the jury should not be directed to presume livery of seisin, as they would be if the possession had been held as on a claim of absolute ownership. *McDonald v. McGillis*, 458.

See RECTORS.—RELEASE.

DEFAMATION.

1. *Slander—Privileged communication.*]—Defendant, a Government detective, knowing that one M. was in partnership with the plaintiff, informed him that the plaintiff was connected with a gang of burglars which the defendant had been the means of breaking up, and put him on his guard. *Held*, that the communication was privileged, and, there being no evidence of malice, that the plaintiff was properly nonsuited.—*Smith v. Armstrong*, 57.

2. *Libel — Justification — Pleading.*]—The declaration was for a libel which charged defendant, an inspecting field officer of Militia, with swearing and drunkenness on a particular occasion specified and generally. Defendant pleaded that the statements complained of in the declaration were true in the sense in which they were alleged to have been used. *Held*, that the plea was bad, as being too general.—*Baretto v. Pirie*, 468.

DELAY.

In taking out and serving Judge's order.]—See PRACTICE, 2.

In serving attested copy of execution, after sale of stock under it.]—See STOCK.

DEMAND AND REFUSAL.

To transfer stock sold by Sheriff.]—See STOCK.

DEMURRER.

Demurrer — Costs — Practice.]—Defendant pleaded not guilty, and a special plea, to which the plaintiff demurred, and having carried the cause to trial before arguing the demurrer, defendant obtained a verdict of not guilty. The plaintiff then set down the demurrer for argument, in order to obtain the costs of it, but the Court under the circumstances refused to hear the case—holding that the plaintiff, having failed on the merits, could not put defendant to the costs of an argument, in order to get the costs of the demurrer.

Remarks as to the practice in such a case.—*Macmartin v. Thompson*, 334.

See COSTS, 2—VENUE.

DEPOSIT.

Sale of lands—Default by Vendee—Right to recover back deposit.]—See SALE OF LANDS.

DESCRIPTION OF LAND.

Where land was described as commencing at a post planted four chains and fifty links from the north-east angle of a lot—*Held*, that the post (the existence and position of which were satisfactorily estab-

lished) was the point of commencement, though its distance from the true north-east angle was inaccurately given.—*Marrs v. Davidson*, 641.

DEVIATION FROM HIGHWAY.

See HIGHWAY, 2.

DEVISE.

See WILL.

DISCONTINUANCE.

See STAYING PROCEEDINGS.

DISTILLERS.

Duty on Spirits—Information for—27-28 Vic. c. 3, 29 V. c. 3—*Evidence—Refusal to produce books—Presumption—Prior judgment.*—On an information, under 27-28 Vic. 3, against defendant as a distiller, for the non-payment of duty on spirits manufactured by him—

Held, 1. that defendant was liable to pay duty upon all spirits manufactured by him, not merely on such as had been measured and ascertained in the manner pointed out by the Statute; for the obtaining the duty on all spirits manufactured is the main object of the act, and the provisions for ascertaining the quantity, &c., are only auxiliary thereto,

2. It was proved by one A, that he sold, as agent for defendant at Montreal, between the days mentioned in the information, 159,608 gallons more than appeared on the credit side of defendant's stock book, and on which duties had been

paid; and a number of invoices of these sales, which were produced, represented the spirits to be 50 over proof. Moreover, A. said that large quantities of spirits had been consigned to him direct, and it was to be gathered from the evidence that deliveries had been made to the purchasers direct from the conveyance by which they had been sent by defendant. *Held*, that from this evidence, unanswered in any way, the jury were warranted in finding against defendant for the duty on that quantity.

3. *Held*, also, that the jury were rightly told that defendant's non-production, upon notice, of his books, which he was proved to have kept, furnished ground for strong presumption against him.

4. *Held*, also, that sub-section 2, of sec. 14, of 29 Vic., ch. 3, throwing the proof of payment of duty on defendant, was properly treated as applicable, though passed after the period for which duties were claimed; for it related only to matter of evidence and procedure.

5. *Held*, also, that a judgment in defendant's favor, on a previous information against him for penalties for not making true entries of the spirits taken from the close receiver and brought into his distillery, and of the number of gallons disposed of by him, between the days mentioned in this information, was properly rejected as evidence for him in this cause; for there was nothing to connect the spirits on which duties were claimed here with those taken from the receiver, and making true entries of the spirits disposed of by him would not prove payment of the duties.—*The Attorney General v. Halliday*, 397.

DISTRESS.

See LANDLORD AND TENANT, 2.

WILL, 1.

DIVISION COURT CLERK.

See SET-OFF.

DOWER.

1. *Damages—Pleading—Costs.*—Demandant sued for dower as widow of J., alleging in her declaration that J. died seized, claiming damages from the time of his death, and averring service of a demand of dower. There was no plea, and the demandant went down to assess damages.

Held, That the tenant had clearly a right to shew that J. had parted with his estate, and therefore did not die seized, though he could not dispute his seizin during coverture.

The tenant proved a deed made in 1831, of the land in question, by J. to the tenant; and in reply the demandant proved another deed made in 1834, by J. to his father, to which the tenant was a subscribing witness. *Held*, that as either deed shewed the estate out of J. during his life time, it was unnecessary to consider the effect of the tenant being a subscribing witness to the second deed; and in any event, as J. could not set up the second deed to avoid the first, having made both, neither could the demandant, who claimed through him.

As J. therefore did not die seized, it was *held* that demandant could have only nominal damages, from the time of the demand; but that

she was entitled to such damages, and the tenant was not entitled to the costs of the assessment.

Semble, that a demandant failing in the action is liable to costs.

Semble, that averments of the service of demand, and that the husband died seized, should not be inserted in the declaration, but suggested afterwards; and being irrelevant to the right of action, if so alleged they are not admitted by not being traversed,

Quere, When the tenant does not plead, so that there is no trial, whether the right to costs cannot be shewn by producing the demand and affidavit of service before the Master on taxation.—*Scratch v. Jackson*, 189.

2. *Election—Pleading.*—Dower. First Plea.—That demandant's husband by his will gave her an annuity of £25 chargeable on his estate, and a life-estate in certain lands, and thereby declared that such annuity should be in lieu of dower: that demandant entered into possession of such property, and received the annuity, and elected to take and did take the same in lieu and satisfaction of her dower.

Second Plea—on equitable grounds—that by said will the husband gave demandant an annuity of £25, which was declared to be in lieu of dower, and was to be paid out of his estate by his executors, and by the same will he devised certain land to her for life: that he afterwards died, leaving besides land personal estate sufficient to pay the annuity: that demandant entered on the land so devised to her, and elected to receive said an-

nuity and devises in lieu of her dower; but before any payment of such annuity had fallen due, she, against the will of the executor, possessed herself of the personal estate, and converted the same to her own use; and the executor, having no other property out of which he could pay such annuity, was thereby prevented from paying the same, as he would otherwise have done pursuant to the will.

Held on demurrer, both pleas good: that the first was clearly a good defence at law; and as to the second, though the demandant's wrongful act alone would not defeat her claim, yet there was besides an express averment that she elected to take the annuity and devises in lieu of dower, which was sufficient without shewing the receipt of any portion of the annuity.—*Walmsley v. Walmsley*, 392.

See COVENANTS FOR TITLE.

DUTY.

When recoverable as damages for breach of contract.—See DAMAGES, 2.—RAILWAY COMPANIES, 2.

On Spirits—Information for under 27-28 V. c. 3.—See DISTILLERS.

Proof of imposition of, in foreign country.—See RAILWAY COMPANIES, 2.

EJECTMENT.

1. *Appearance by landlord—Entitling papers—Irregularity—Waiver.*—In ejectment brought against A. and B., by consent of the plaintiff's attorney an appearance was entered

for S. as landlord, A. and B. not appearing. The notice of trial was entitled as against A. and B., and notice was served on the plaintiff's attorney warning him that this would be objected to. The *Nisi Prius* record contained no appearance, but annexed to it was an appearance by S. as landlord. The plaintiff was allowed to enter this on the record, and took a verdict, defendant not appearing. On application to set aside the verdict, the plaintiff objected that the affidavits filed by defendant, entitled as against S. alone, were wrongly entitled, and that no Judge's order was shewn allowing S. to defend.

Held, 1. That the plaintiff was precluded from the last objection, for he had consented to S. appearing, and obtained leave to enter his appearance on the record—

2. That the plaintiff's own proceedings warranted S. in assuming that he was to appear alone, and that the affidavits objected to were therefore rightly entitled—

3. That the notice of trial was wrongly entitled.

The verdict therefore was set aside, the costs to be paid by plaintiff.—*Jones v. Seaton*, 166.

2. *Plaintiff entitled to a share only—Form of Postea—Defence by tenant in common—Practice.*—In this case the plaintiff's title was the same as in the case of *Lyster v. Kirkpatrick*, p. 217, and he was held entitled to recover two undivided third parts, for the reasons there given.

It was urged, on the authority of *Leech v. Leech*, 24 U. C. R. 321, that the plaintiff being held so entitled, the *postea* should be awarded to him generally—but *Held*, not,

the proceedings on both sides having been directed to try the title to the whole.

Quære, whether in this country, owing to the provisions as to notice of title, a plaintiff must give notice of his claim being only for a moiety, before he can insist upon defendant admitting his claim and denying actual ouster.—*Lyster v. Ramage*, 233.

3. *Notice of title—Amendment—Practice—Misconduct.*—In ejectment, the plaintiff's notice of title being defective, in claiming under an agreement for a lease instead of a lease, the Judge at *Nisi Prius* granted a summons to amend it, returnable before himself as a Judge in Chambers in half-an-hour, and upon it made an order for the amendment. The case then proceeded, and the plaintiff had a verdict.

It is no ground for a new trial that the cause was taken out of its turn on the docket.

Defendant moved against the verdict for irregularity, because no issue book had been served in time shewing by his affidavits that notice of trial was given on the 11th October, and that on the commission day an issue book with notice of plaintiff's, but not of defendant's title, was served. In answer it was sworn that with the notice of trial an issue book had been served, with which, for a reason explained, no copy of plaintiff's notice of title was given, and that, according to promise, such notice was given afterwards, to which a copy of the issue book was attached, to make it intelligible.

The Court severely censured the conduct of defendant's attorney, in

suppressing the fact of an issue book having been delivered with the notice of trial.

Quære, whether when A. is in possession of premises as hired servant of B., a writ of ejectment should not be directed to the latter.—*Parsons v. Ferriby*, 380.

4. *Issue book—Practice.*—In ejectment it is not necessary to annex the notices of title on either side to the issue book.—*Campbell v. Pettit*, 507.

ELECTION.

Between several counts in indictment.—See CRIMINAL LAW, 5.

Plea of, in dower.—See DOWER, 2.

ENTITLING PAPERS.

See EJECTMENT, 1.

EQUITABLE PLEADINGS.

See CONTRACT—DOWER, 2—SET-OFF.

ERROR.

For mistake in summoning jurors.—See YORK AND PEEL, UNITED COUNTIES OF.

ESTATE.

See DEED, 2.—RECTORS.—REGISTRY LAWS, 1, 4.—RELEASE.—WILL, 3.

ESTOPPEL.

See DEED, 1.—DOWER, 1.—EJECTMENT, 1.—R. W. COS. 1.—RECTORS.—SHERIFF, 2.

EVIDENCE.

Declarations.—[In an interpleader to try the right to goods seized under execution against A. and B., and claimed by the plaintiff, C., a brother of B.—*Held*, that B.'s statement, while in possession of the property with the plaintiff's assent, that it belonged to his sister, could not be evidence, as against the plaintiff, to disprove the plaintiff's right.—*Earnshaw v. Tomlinson*, 610.]

Of defendants being common carriers.—*See* CARRIERS.

Of declarations of beneficial plaintiff.—*See* INSURANCE, 3.

See AFFIDAVIT, 1.—BOUNDARY-LINE COMMISSIONERS.—COMMISSION TO EXAMINE WITNESSES.—CONFLICT OF LAWS.—CRIMINAL LAW, 3, 4, 6, 7, 8, 9.—DISTILLERS.—HIGHWAY, 3.—ILLEGITIMATE CHILD.—MALICIOUS PROSECUTION, 2, 3.—PRINCIPAL AND AGENT.—R. W. COS.—REPLEVIN, 2.—THEFT.—TROVER.

EXCESSIVE DISTRESS.

See LANDLORD AND TENANT, 2.

EXECUTIONS.

See SHERIFF—STOCK—TAXES, 3.

EXECUTORS.

1. *Note signed by Executors, per. Proc. J. M.—Proof of authority to bind them personally.*—Action against J. S. Meredith and J. his wife, M. N., and W. N., as makers of four notes signed "The executors of the estate of the late William Notman, per Pro. James S. Meredith." M. N. was called as a witness by plaintiffs, and proved

that Meredith had managed the affairs of the estate since testator's death, and she had left it to him to do what he thought best in winding it up; but she said she never gave him power to make her personally liable, and that she knew nothing of these notes. The jury having found for the plaintiffs—*Held*, that though Meredith might have sufficient authority as regarded the estate, he clearly had none to bind defendants personally, as they were sued; and a nonsuit was ordered.—*The President Directors and Company of the Gore Bank v. Meredith, et al.* 237.

2. *Power of Attorney by—Endorsement under—Authority.*—The plaintiffs sued defendant, who was an executor of E., as endorser of three promissory notes payable to "the executors of the late E.," two being endorsed "J. M. B., agent of the executors of the late E.," and the third "the executors late E., per pro B." B. held a power of attorney from the executors, by which they as executrix and executors authorised him (among other things) for them as such executrix and executors to make and endorse all such promissory notes as might be requisite in the conduct and management of the estate. These notes, it appeared, were received by B. from the makers for debts due to the estate, and given by him, endorsed as above, to M., one of the executors, who was largely indebted to the estate, and was in difficulties, M. telling him that he wanted to get them discounted on his own account. They were so discounted by the plaintiffs, to whom M. owed a large sum, and who made no enquiries as to the extent of B's. authority, or the circumstances under which M. obtained them. Defend-

ant knew nothing of the matter until after the notes fell due. The Court being left to draw inferences of fact, and the question being the personal liability of the defendant—*Held*, 1. That the indorsements were sufficient in form; but, 2, that not being for the purposes of the estate they were not within the authority given to B., the extent of which it was the plaintiffs' duty to ascertain; and a nonsuit was ordered.—*Quære* as to the effect of a power given by an executor. *Sem-ble*, that it may authorise the attorney to charge him by acceptances, &c., in his own right, for otherwise it would be illusory, but only for the payment of testator's debts. *The President, Directors, and Company of the Gore Bank v. Crooks*, 251.

3. *Sale of mortgage by.*—An executor holding a mortgage given to the testator, sold and assigned it, taking the purchaser's promissory notes payable to himself or order. *Held*, upon an issue of *plene administravit*, that this in law amounted to a receipt of the original debt, making the executor chargeable with the mortgage as an asset in possession. *Macbeth v. Macbeth, Executrix*, 549.

See SET-OFF.

FALSE PRETENCES.

See CRIMINAL LAW 1, 7.

FENIANS.

See CRIMINAL LAW 3, 4, 5, 9.

FIELD NOTES.

See HIGHWAY, 3.

FOREIGN LAW.

See CONFLICT OF LAWS.

FRAUDS, (STATUTE OF)

See CONFLICT OF LAWS.

GARNISHMENT.

See ATTACHMENT OF DEBTS.

HABENDUM.

Inconsistent with premises.—See DEED, 2.

HIGHWAY.

1. *Shutting up*—*Soil in whom vested*—C. S. U. C. ch. 54, sec. 336.]—A highway, of which the origin was not clear, had been travelled for forty years across the plaintiff's lot, the patent for which was issued in 1836. The municipality in 1866 passed a by-law shutting up this road, but no conveyance was ever made to the plaintiff. They afterwards threw down a fence with which he had enclosed the old road, and took away gravel from it. The plaintiff having brought trespass—

Held, that he could not recover, for the user for thirty years after the patent would be conclusive evidence of a dedication as against the owner, and such dedication was equivalent to a *laying out* by him, so that the road, under C. S. U. C. ch. 54, sec. 336, was vested in the municipality.—*Mytton v. Duck et al.*, 61.

2. *Right to deviate from.*—Trespass *quare clausum fregit*.

Plea, that at the time when, &c., there was a highway adjoining the plaintiff's said land, which said highway was in certain places impassable and out of repair, wherefore defendant, for the purpose of using such highway, necessarily deviated a little therefrom on to the plaintiff's said land, going no further from said highway than was necessary, and returning thereto as soon as practicable, and doing no unnecessary damage in that behalf—which are the alleged trespasses.

Held, on demurrer, a good plea.
—*Carrick v. Johnston*, 65.

3. *Survey—Discrepancy between work on the ground and plan—Highway—Field notes.*—The question in an action of trespass being whether there was a highway between lots 20 and 21 in a township, which the plaintiff denied, it appeared that the practice of surveyors in laying out a road allowance was to plant a post on each side of it, marked on the side nearest the road with the letter R., and on the opposite side with the number of the lot, and to plant a third post in the centre of the road marked R. on two or on all four sides. Stakes thus marked were found between 19 and 20, but none between 20 and 21, and it was sworn that an original post had been seen there 24 years ago, and until within three or four years, marked 20 and 21, thus far shewing that there was no road allowance between those lots.

On the other hand, the registered map of the township, the map in the Crown Lands Department, and the field notes of the surveyor who made the original survey, shewed such allowance. The plaintiff and defendant both claimed under grants from the Crown of separate

parts of lot 21, described as commencing on the northern limit of such allowance, and without it the defendant would have no access to his land.

The jury were told that the work on the ground must govern, but that under C. S. U. C. ch. 54, sec. 313, the fact of the Government Surveyor having laid out this road in his plan of the original survey, would make it a highway, unless there was evidence of his work on the ground clearly inconsistent with such plan. The jury having found for defendant—

Held, that the direction was right, but that the verdict was contrary to evidence, and a new trial was granted on payment of costs.

The Queen v. Great Western R. W. Co., 21 U. C. R. 555, remarked upon.

A certified copy of part of the field notes of the original survey is admissible in evidence.—*Carrick v. Johnston*, 69.

HOTEL-KEEPERS.

See INNKEEPERS.

HUSBAND AND WIFE,

See ILLEGITIMATE CHILD.

ILLEGITIMATE CHILD.

Maintenance of—Action for—Coverture of plaintiff—Form of affidavit—C. S. U. C. ch. 77—Evidence.—In an action brought for the maintenance of an illegitimate child, under Consol. Stat. U. C.

chap. 77, sec. 4, it appeared that the plaintiff was a married woman, and that the affidavit filed by the mother stated that the defendant was the father of such child, not "really the father," as required by the Act. *Held*, 1. That the plaintiff could not sue, for it must be presumed that the necessities furnished were her husband's; and that she must fail on never indebted, no plea in abatement being requisite. 2. That the omission in the affidavit was fatal. A nonsuit was therefore ordered.

The affidavit was produced from the office of the City Clerk, and purported to be sworn before the Police Magistrate of Toronto, where she resided. *Held*, sufficient evidence to go to the jury that it was deposited by her in the proper office.

It appeared probable from the statement of the mother that she was liable to the plaintiff for the demand sued for. *Held*, that the jury should have been told that if she was so liable her unsupported testimony would not sustain the action.—*Jackson v. Kassel*, 341.

See CRIMINAL LAW, 6.

INCEPTION OF EXECUTION.

See TAXES, 3.

INDICTMENT.

Several Counts—Election.—See CRIMINAL LAW, 5.

INNKEEPERS.

Rights of.—An innkeeper has

the sole right to select the apartment for a guest, and if he finds it expedient, to change it and assign him another. He cannot be treated as a trespasser for entering to make the change.

A guest who has been received loses the right to be entertained if he neglects or refuses to pay upon reasonable demand.—*Doyle v. Walker*, 502.

INSANITY.

See CRIMINAL LAW, 8.

INSOLVENCY.

See ATTACHMENT OF DEBTS.

INSURANCE.

1. *Policy and application—Construction of.*—Plaintiff insured with defendants \$3,400, of which \$1,000 was on his tannery and \$500 on the machinery in it, on an application valuing the tannery and fixtures at \$1,000, which was said to be the two-thirds of the actual value, but agreeing that in case of loss defendants should only be liable as if they had insured two-thirds of the actual cash value, anything in the policy or application notwithstanding. The application was referred to in the policy as forming part of it, and stated the promise to be to pay all losses or damages not exceeding the said sum of \$3,400. the said losses or damage to be estimated according to the true and actual value of the property at the time the same should happen. The building and machinery having been destroyed by fire, the jury

found the total cash value of the former to be \$1,050, and of the latter \$750.

Held, that the plaintiff was entitled to recover only two-thirds of these sums. *Williamson v. the Gore District Mutual Fire Insurance Company*, 145.

2. *Insurable interest*—*C. S. U. C. ch. 93, sec. 53.*]—Plaintiff insured with defendants a house in his possession, which he had purchased, with the land on which it stood, as part of lot A, but which was afterwards found to be upon the adjoining lot, B., having been built there in consequence of an unskilful survey. The house having been burned, it was objected that having no title to the land he had no insurable interest; but

Held, otherwise, for under *C. S. U. C. ch. 93, sec 53*, he had a right either to the value of his improvements or to purchase at the value of the land.

Quære, whether an insurance company with whom the actual owner of a house, without fraud or wilful misrepresentation, effects an insurance thereon, can set up the legal title of a stranger to the land on which the house stands, as a defence against the claim of the assured.—*Stevenson v. The London and Lancashire Fire Assurance Company*, 148.

3. *Double Insurance—Construction of Policy—Extent of Liability.*]—Plaintiff insured with defendants \$2000 on a building, and \$2000 on the furniture, and with another company \$2000 on the building and furniture together; and a loss occurred of \$1050 on the building, and \$878 on the furniture. The defen-

dants' policy provided that in case of loss, the assured should recover from them only such portion thereof as the amount assured by them should bear to the whole amount assured on the property; and, under this, they contended that the other insurance must be treated as one for \$2000 on the building and \$2000 on the furniture, so that they would be liable only for one-half of the loss on each; but

Held, that as the whole amount insured was \$6000, of which defendants had taken \$4000, they were liable for two-thirds of the loss.—*The Trustees of the First Unitarian Congregation of Toronto v. The Western Assurance Company*, 175.

4. *Condition—Construction of—Untrue statement as to title.*]—One of the conditions of a fire policy required that persons insured should within fourteen days give in writing an account of their loss or damage, such account of loss to have reference to the value of the property destroyed or damaged immediately before the fire, and should verify the same by their accounts, and by affidavit, and such vouchers as in the judgment of the Company might tend to prove such account and value, and should produce such further evidence and give such explanations as might be reasonably required; and if there should appear any fraud or false statement in such account of loss or damage, or in any of such accounts, evidence, or explanations, or if such affidavit should contain any untrue statement, the policy should be void. *Held*, that as an affidavit could be required only to verify the account of loss or damage, the "untrue statement" must refer also to such account, and that an untrue statement in the affidavit as

to the plaintiff's title would not avoid the policy.

In this case the statement complained of was, that the plaintiff was absolute owner of the building insured, which was unincumbered, whereas he had not yet paid for the land. He had, however, put up the building himself, so that if it had not become part of the realty his statement would have been literally true.—*Elmore P. Ross v. The Commercial Union Assurance Company of London*, 552.

5. *Policy—Proof of assignment.*—Action upon a fire policy by A., the person insured, averring an assignment to B. & C., notified to defendants and endorsed on the policy, and an agreement by them that it should stand for the benefit of B. & C. Plea, denying the assignment, &c. The policy contained no condition as to assignment. The sale and transfer by A. to B. & C. of the goods insured was proved. An assignment was endorsed on the policy, purporting to be made by A. to B. and C., but signed by D., the agent of A., in his own name, and witnessed by M., defendants' local agent. It was proved that M. entered the transaction in a book kept by him, and communicated with the head office at Montreal; that the Secretary there answered, suggesting a transfer of the policy, and a new policy upon which the premium for the unexpired term of the old policy should be credited; and that afterwards B. & C. paid an additional premium to M. to cover an increase of the risk.

Held, that this evidence was sufficient to sustain the issue for the plaintiffs.

Held, also, that the declaration of B., one of the parties for whose benefit the suit was brought, was admissible as evidence for the defendants.—*Elmore P. Ross and Allen Ross v. The Commercial Union Assurance Company*, 559.

INTENTION.

Immaterial in Trespass.—See TRESPASS.

INTEREST.

Insurable Interest.—See INSURANCE, 2.

See USURY.

ISSUE BOOK.

See EJECTMENT, 3. 4.

JOINT STOCK COMPANIES.

Sale of Stock in, by Sheriff.—See STOCK.

JOINT TENANTS.

See RECTORS.

JUDGMENT.

When admissible as Evidence.—See DISTILLERS.

JUDGMENT NON OBSTANTE.

Semble, that there may be judgment *non obstante* where there is a general verdict for defendant, and the plaintiff may then have his writ of enquiry to assess the damages.—*Britton, et al. v. Fisher*, 338.

JURISDICTION.

See COUNTY COURT, 1—PRACTICE COURT.

JURY.

See YORK AND PEEL, UNITED COUNTIES OF.

JUS ACCRESCENDI.

Between partners.—See PARTNERSHIP, 2.

JUSTIFICATION.

Plea of in Libel.—See DEFAMATION, 2.

In trespass, under right to deviate from Highway.—See HIGHWAY, 2.

LANDLORD AND TENANT.

1. One M., being the original lessee, assigned to P., who did not execute the assignment, but assigned to defendant by mortgage, reciting it. Afterwards, on a decree in a foreclosure suit brought on this mortgage, the land was sold to M. as the highest bidder, who entered into possession, but paid nothing and received no conveyance, nor was any order made vesting the property in him.—*Held*, that defendant became liable on the covenants in the lease, under his assignment from P., and continued so notwithstanding the sale.—*Magrath v. Todd*, 87.

2. *Lease—Construction—Distress.*—Lease dated 15th December, 1862, for five years, at an annual rent, half payable on 1st January, and half on 1st February following in each and every year during the term, with an agreement at the end

that the first payment of rent should not become due until the 1st January, 1864.

Held, that this agreement did not prevent any rent from falling due in 1863, but was limited to the first payment to be made on the 1st January, 1863, or at most to the rent for the first year; and that two years' rent therefore was due before the 17th November, 1864.

Part of the plaintiff's goods having been distrained for rent off the premises—*Held*, that he might recover their value either in trespass or trover.

The rent due was \$401, and the value of the goods distrained \$469.—*Held*, that the difference was insufficient to support an action for excessive distress.—*Huskinson v. Lawrence, et al.* 570.

Appearance by Landlord in Ejectment.—See EJECTMENT, 1.

LARCENY.

See THEFT.

LEASE.

See DEED, 2—LANDLORD AND TENANT—RECTORS—REGISTRY LAWS, 2.

LEAVE AND LICENSE.

See TRESPASS, 2.

LETTERS PATENT.

See PATENT FOR INVENTIONS.

LEX FORI.

See CONFLICT OF LAWS.

LIBEL.

See DEFAMATION, 2.

LICENSE TO SELL LIQUORS.

1. *Tavern Licenses—Board of Commissioners of Police—Powers of, under 25 Vic. ch. 23.*—By the first five subsections of sec. 246 of the Municipal Act, C. S. U. C. ch. 54, the municipal councils of cities had authority to pass by-laws for granting tavern licenses, and declaring the conditions to be complied with by applicants, &c. ; and by section 251 every person licensed was compelled to exhibit in large letters over the door the words, "Licensed to sell wine, beer, and other spirituous and fermented liquors," under a penalty of \$1. By 25 Vic., ch. 23, these subsecs. of sec. 246 were repealed as regarded cities, and the same powers substantially given to the Board of Commissioners of Police, but no express authority to pass by-laws.

Held, that even if all the powers of the City Council were transferred to the Commissioners, they clearly could not impose a higher penalty for not exhibiting the words prescribed, than provided for by sec. 251 ; and a conviction under their by-law imposing a fine of \$5 was therefore quashed.—*The Queen v. William Lennox*, 141.

2. *Shop License—29 & 30 Vic. ch. 51, secs. 249, 254.*—Under the Municipal Institutions Act of 1866, secs. 249, 254, a person holding a shop license for the sale of liquors is punishable, under sec. 254, for selling liquor at his shop in quantities less than a quart.—*The Queen v. Faulkner*, 529.

LIMITATIONS (STATUTE OF)

1. *Exception in C. S. U. C. ch. 88, sec. 3—Tax sale.*—In ejectment the plaintiff claimed under a tax deed made in 1842, coming within the 3 Vic. ch. 46. Defendant proved a paper title from the patentees, and gave evidence of possession held from 1846, for more than twenty years before this action. The jury having found for the defendant, *Held*, without deciding the validity of the tax sale, that he had acquired a good title under the Statute of Limitations, against which the plaintiff was not protected by sec. 3 of Consol Stat. U. C. ch. 88.—*Cushing v. McDonald*, 605.

2. *Joint note—Payment by one joint maker, C. S. U. C. ch. 44, secs. 3, 4.*—A note signed by two persons beginning "I promise to pay," is joint and several.

Payments made by one of two such makers will not take the case out of the Statute as against the other, unless made expressly as his agent and by his authority, and such agency must be proved by the plaintiff apart from the fact of payment.

In this case, there being no such proof, a nonsuit was ordered as to one of the two joint makers, and the verdict allowed to stand as against the other.—*Creighton v. Allen and Lewis Fretz*, 627.

LIQUORS.

See LICENSE TO SELL LIQUORS.

LIVERY OF SEISIN.

See DEED, 2—RELEASE.

MAGISTRATES.

Taking unauthorized affidavits.]—
See AFFIDAVITS, 2.

MALICIOUS PROSECUTION.

1. *Malicious arrest—Pleading.*]—

A declaration for malicious arrest alleged that at the the time of making the affidavit, procuring the Judge's order, issuing the *capias*, and arresting the plaintiff, defendant had no reasonable or probable cause for believing that the plaintiff was about to quit Canada with intent to defraud defendant of the debt, or with any fraudulent intent, yet he falsely and maliciously, and without any reasonable or probable cause, made oath that he verily believed the plaintiff was about, &c., and by means of such false allegations, falsely and maliciously induced the Judge to grant the order, and caused the plaintiff's arrest.

Held sufficient: that it was unnecessary to shew the order set aside, or to aver that the affidavit shewed facts and circumstances to satisfy the Judge, the real cause of action being that the defendant by his false and malicious statement set the law in motion.

Defendant in his plea stated what allegations the affidavit contained, (not averring their truth) and that they satisfied the Judge, who thereupon granted the order.

Held, clearly no defence.—*Griffith v. Hall*, 94.

2. *Reasonable and probable cause.*

—In an action for malicious prosecution of the plaintiff for stealing timber, it appeared that defendant

took one B., who had cut timber for him in 1862-3, to look at some timber lying near the plaintiff's barn, which B. told him he was positive was the same that he had cut for defendant. B. found a newly-made path from this timber to where he had cut for defendant, and at this latter place he found that most of the timber had been carried off and the remainder knocked about.

Held, that there was reasonable and probable cause: that B's evidence being uncontradicted, and there being no proof of defendant's absence of belief that the timber was his, there was nothing to go to the jury; and that the plaintiff therefore was properly nonsuited.

One of the plaintiff's daughters swore that the timber at the barn had been cut elsewhere by the plaintiff, but there was nothing to shew that the defendant was aware before the plaintiff's trial that she knew anything of the matter. *Held*, immaterial.—*Joint v. Thompson*, 519.

3. *Malicious Prosecution—Evidence.*]—

In an action for malicious prosecution, want of reasonable and probable cause must be shewn by the plaintiff. Slight evidence may be sufficient, for it is the proof of a negative, but there must be some proof; and in this case, where it was shewn only that the defendant laid the information on which the plaintiff was arrested, and that the magistrates, after hearing the parties, dismissed the charge—

Held, that a verdict was properly directed for defendant.—*Barbour v. Gettings*, 544.

MALICIOUSLY PROCURING PROCEEDINGS IN CHANCERY.

See ACTION, 1.

MANDAMUS.

See CERTIORARI—CLERK OF THE PEACE—PRACTICE COURT—STOCK.

MARKETS.

See MUNICIPAL CORPORATIONS, 3.

MEASURE OF DAMAGES.

See DAMAGES, 2.

MEMORANDA.

Calls to the Bar, 35, 245, 420 ;
Rules of Court, 421.

MISREPRESENTATION.

See ACTION, 3.

MISTAKE.

In paying taxes on the wrong lot.]
—See TAXES, 2,

To the wrong Officer.—See TAXES,
5.

MONEY PAID.

Defendant owing one C. procured K. to give his note to C, for \$400, and got the plaintiff to give K. a mortgage by way of indemnity. K. having paid the money called upon the plaintiff, who, being unable to pay, gave K. an absolute deed of the land, which K. accepted in satisfaction. *Held*, that the \$400 for which the land was thus taken, might be recovered by the plaintiff

from defendant as money paid.
Clark v. Chipman, 170.

MORTGAGE.

See EXECUTORS, 3.—REGISTRY LAWS, 1, 3.

MUNICIPAL CORPORATIONS.

1. *By-law of United Townships—Separation—Application to quash—Practice—Survey.*—A by-law was passed by the united townships of Smith and Harvey, to levy a certain sum on lands in Harvey, to defray the expense of a re-survey of that township. The union having been dissolved—*Held*, that an application to quash was properly made by a rule calling on the corporation of Harvey, upon a certified copy obtained from the clerk of Smith, the senior township.

The certificate was under the corporate seal of Smith, but there was no seal to the copy of by-law, nor anything but the certificate to shew that it had been sealed. *Held*, sufficient.

The by-law directed the money to be levied “on all lands patented, leased, sold, agreed to be sold, and located as free grants” in the township of Harvey. *Held* bad, following Scott and the corporation of Peterborough, 25 U. C. R. 453.—*In re Scott and The Corporation of the Township of Harvey*, 32.

2. *Re-survey of townships—Consol. Stat. U. C. ch. 93—Right of action by the County.*—Declaration, that the plaintiffs, pursuant to the Statute, applied to the Governor to have the concession lines in the defendants’ township re-surveyed,

which was ordered accordingly, and the expense paid by the plaintiffs: that the plaintiffs thereupon directed the defendants to levy and collect the money so paid, but although they did levy part they refused to pay the same to the plaintiffs. *Plea*, that the only direction was by the plaintiffs' by-law, which before suit was quashed.

Held, on demurrer, that the declaration was bad for not shewing a by-law, as the plaintiffs could proceed only in that way; and that the plea was good.

Quere, whether the money can be levied before the survey has been actually made.—*The Corporation of the County of Peterborough v. The Corporation of the Township of Smith*, 40.

See also SURVEY.

3. *By-law--Markets--C. S. U. C. ch. 54, sec. 294—Affidavit not entitled in any Court—Verification of by-law.*—A by law prohibiting any person bringing produce, articles, commodities or things to a city market, from selling or offering the same for sale within the city limits, on their way to market, or without having paid market toll, and before offering such things for sale in the market—*Held*, illegal, and quashed, as beyond the power of the corporation.

An affidavit in support of the motion, not entitled in any Court, but sworn before a commissioner styling himself "A Commissioner in B. R. and C. P., &c." *Held*, sufficient.

The copy of the by-law filed was under the seal of the municipality and sworn to have been received from the clerk, and opposite the seal was the signature, "M. Flana-

gan, City Clerk," with the words, "A true copy," above. *Held*, sufficiently verified.

Held, also, that on the affidavits, stated in the case, it sufficiently appeared that the applicant was a resident of the City of Kingston.—*Kinghorn and the Corporation of the City of Kingston*, 130.

4. *Fi. fa. against Reeve returned nulla bona—Application for quo warranto—Evidence.*—An application for an injunction in the nature of a *quo warranto* against a Reeve for usurping the office, on the ground that a *fi. fa.* against him had been returned *nulla bona*, was founded only on an affidavit that one D. had recovered a judgment against him, on which a *fi. fa.* issued and was placed in the Sheriff's hands, and returned by him *nulla bona*.

Held insufficient, for it should have been shewn how and to whom the return had been made, and the writ and return should have been produced or proved. The rule *nisi* was therefore discharged with costs.—*In re Wood*, 513.

See HIGHWAY, 1.—LICENSES TO SELL LIQUORS—SURVEY—TAXES, 1.—VENUE—YORK AND PEEL, UNITED COUNTIES OF.

NEGLIGENCE.

See TRESPASS—TROVER.

NEW TRIAL.

See ACTION, 2.—EJECTMENT, 3.—PARTNERSHIP, 1.—YORK AND PEEL, UNITED COUNTIES OF, 2.

NISI PRIUS.

See ABSCONDING DEBTORS.—COMMISSION TO EXAMINE WITNESSES, 2.—COSTS, 1.

NOTICE OF TITLE.

See EJECTMENT, 2, 3, 4.

OFFICE.

Tenure of, by Registrar.]—See REGISTRAR, 1.

PARTNERSHIP.

1. On the contradictory affidavits in this case, the Court refused to interfere on the ground of an alleged partnership between plaintiff and defendant.—*Clark v. Chipman*, 170.

2. *Jus accrescendi*—Tenants in Common—Conversion—Trover.]—A., of whom the plaintiff was administratrix, and defendant having worked and stocked a farm in partnership.—*Held*, that on the death of one the survivor did not take the whole of the chattels, but that the maxim "*Jus accrescendi inter mercatores locum non habet*," applied.

One tenant in common of chattels may maintain trover against the other for a sale of the property, where such sale is plainly intended not for the objects of the joint owners, such as to pay partnership debts, &c., but in order to deprive the other owner of all interest in the property or proceeds.

In this case the defendant after A.'s death sold the stock and crops on the farm, and threatened to go off with the money, unless the plaintiff (A.'s administratrix) would settle with him on his own terms. After action brought he applied part of the proceeds towards payment of the debts, but until then he had never pretended that the sale was made with that object. The Court being left to draw inferences

of fact.—*Held*, that such sale was a conversion, and that the plaintiff might maintain trover.—*Rathwell v. Rathwell*, 179.

PATENT FOR INVENTIONS.

Letters Patent—Invention—Novelty.]—The plaintiff obtained a patent for a platform pump, constructed upon the principle and for the purpose of raising water for animals to drink from wells by their own weight and act, the specification claiming such principle as his invention. He sued for the infringement of this patent.

It appeared that an inclined platform working upon a fulcrum led up to the trough, and that being depressed by the weight of the animal when near the trough, it forced down the piston rod and plunger, with which it was connected, thus driving the water up a pipe into the trough. There was nothing new either in the different parts or in the principle on which they produced their effect, but the novelty, if any, was in the combination.

Held, that the patent, not being for such combination, but for the principle, could not be sustained.

Semble, that the utilizing the instinct of the animal to seek water was the only novelty, and that this could not be the subject of a patent.

The infringement complained of was a pump for which defendant had obtained a patent, and it was objected that this patent was an answer to the action until set aside; but *semble*, clearly not.—*Merrill v. Cousins*, 49.

See CONTRACT.

PAYMENT.

By one of two joint makers of note.]—See LIMITATIONS, (STATUTE OF.) 2.

Proof of, to sustain money paid.]—See MONEY PAID.

PERJURY.

See CRIMINAL LAW, 6.

PLEADING.

See ACTION, 1, 3.—COVENANTS FOR TITLE,—CRIMINAL LAW, 5.—DEFAMATION, 2.—DOWER—HIGHWAY, 2.—MALICIOUS PROSECUTION, 1.—REGISTRAR, 2.—REPLEVIN, 1.—VENUE.

POSSESSION.

See DECLARATIONS.—LIMITATIONS. (STATUTE OF)—REGISTRY LAWS, 2.

POWER.

See RECTORS.

POWER OF ATTORNEY.

Given by Executors, Effect of.]—See EXECUTORS, 2.

PRACTICE.

1. *Application in Chambers—Subsequent application to the Court.*]—Where a Judge in Chambers discharged a summons to set aside a final judgment: *Held*, that an application to the Court for the same purpose must be by way of appeal

from the order, not as an original motion, and that all the papers filed on the application in Chambers must be brought before the Court.

Quære, as to the right to file additional affidavits.—*Waddell v. Corbet et al.*, 243.

2. *Delay in taking out and serving order.*]—Defendant signed judgment of *non pros* against a plaintiff in ejectment, for not proceeding to trial in accordance with a twenty days' notice given by defendant. The plaintiff, on the 3d April, 1866, obtained a summons to set aside such judgment, which on the 16th June was made absolute, but the order was not taken out until the 22d October following, nor served until the 27th. *Held*, that the order was waived by such delay, and must be set aside, whether the judgment was void or only irregular.—*Herr v. Douglas*, 357.

3. *Showing cause to lapsed rule.*]—A rule *nisi* to vary an order of *Nisi Prius* was taken out in Easter Term, but allowed to lapse, no rule to enlarge it until Trinity Term having been obtained. In that term, however, the plaintiff's counsel shewed cause against it, and no one appearing on the other side, it was discharged with costs. *Held*, that as it had lapsed the shewing cause was nugatory, and the rule discharging it was set aside as having been improvidently issued; but the error being in part that of the Court no costs were given.—*Jordan v. Gildersleeve*, 361

See—ABSCONDING DEBTORS—CERTIORARI—COMMISSION TO EXAMINE WITNESSES—COSTS—DAMAGES, 1.—DEMURRER—EJECTMENT—JUDGMENT NON-OBSTANTE—MUNICIPAL

CORPORATIONS 1, 3, 4,—PROHIBITION — STAYING PROCEEDINGS — THEFT.

PRACTICE COURT.

Jurisdiction.]—A rule *nisi* for a mandamus cannot be granted by the Practice Court.—*In re Williams and the Great Western Railway Company*, 340.

PRESUMPTION.

Of livery of seisin.]—See DEED, 2.

From defendant's refusal to produce books.]—See DISTILLERS.

PRINCIPAL AND AGENT.

Liability of principal for torts.]—The plaintiffs had stored grain at Seaforth in the warehouse of one T., from whom the defendants held warehouse receipts as security for certain notes. T. having left the country, R., defendants' agent at Seaforth, was advised by their solicitor to get authority from him to sell the wheat covered by their receipts. He accordingly followed T. to the States, and obtained a written authority to sell all the grain in the warehouse belonging to him. The plaintiffs alleged that acting under color of this authority he converted wheat belonging to them in the warehouse, for which they brought trover against defendants.

Held, that if so, there was evidence to go to the jury to make defendants responsible for R.'s acts.—*Gilpin et al. v. The Royal Canadian Bank*, 445.

Money advanced to defendant to purchase wheat for plaintiff—Action

for.—*Plea, money stolen from defendant.*]—See THEFT.

See CONFLICT OF LAWS—EXECUTORS.

PRIVILEGED COMMUNICATION.

See DEFAMATION, 1.

PROHIBITION.

Practice—Moving against Judge's order.]—A County Court Judge made an order staying proceedings in a cause, on the ground, as was alleged, that defendant was applying for his discharge under the Insolvent Act. The plaintiff applied for a prohibition against giving effect to this order, urging that there was no jurisdiction to stay the suit on such a ground. He produced a copy of an affidavit, which he swore was the only affidavit filed on obtaining the summons to stay, but did not shew that no other affidavits were filed before the order was made, although the summons contained leave to file further affidavits, and the order was drawn up on reading the affidavits filed (in the plural.)

The prohibition was refused, for *prima facie* the Judge had authority to make such order, and the applicant did not shew that all the materials on which it issued were before the Court, so as to enable them to see clearly whether he acted without jurisdiction, in which case only a prohibition should be granted.—*Grass v. Allen et al.*, 123.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

QUARTER SESSIONS.

Right to reserve a case—C. S. U. C. ch. 112.]—The appellant having been convicted before Justices of having pretended to be a physician, contrary to 29 Vic. ch. 34, appealed to Quarter Sessions, and was found guilty. *Held*, that the Sessions had no power to reserve a case for the opinion of this Court under Consol. Stat. U. C. ch. 112, the appellant not being a person “convicted of treason, felony, or misdemeanor.”

Semble, that if the 29 Vic. had in terms declared the act charged unlawful, it would have been an indictable misdemeanor.—*Pomeroy appellant, and Wilson, respondent*, 45.

See APPEAL—CLERK OF THE PEACE.

QUO WARRANTO.

See MUNICIPAL CORPORATIONS, 4.

RAILWAY COMPANIES.

1. *Contract to carry—Special conditions—Construction of.*]—The plaintiff signed a paper requesting the defendants to forward certain goods received from him at Toronto, to Indianapolis, in Indiana, “subject to their Tariff and under the Conditions stated on the other side.” On the other side, headed “General Notices and Conditions of Carriage,” the Company “gave public notice,” that in certain events specified they would not be responsible. The tenth paragraph, after stating the course which would be pursued by them with respect to goods addressed to consignees resident beyond the places at which

defendants had stations, proceeded, “And the company hereby further give notice, that they will not be responsible for any loss, damage, or detention,” to goods beyond their limits. It was found by the jury that all the goods had been delivered by defendants to a railway connecting at Detroit with their line and running to Indianapolis.

Held, that the latter part of the sentence could not be regarded as a notice as distinguished from a condition; and that, whether a notice or a condition, it formed part of a special contract on which defendants received the goods, and by which they were exempted from liability.

The plaintiff was at Indianapolis when the goods (except the missing box sued for) arrived there, and remained until some time in the month following. *Held*, that he was resident there within the condition, and that having named himself as the consignee at that place he was estopped from denying such residence.—*La Pointe, Administrator of Braugh v. The Grand Trunk Railway Company*, 479.

2. *Contract to carry—Special conditions—Variance—Damages—Proof of imposition of duties in United States.*]—The declaration charged defendants, in the first count, on a contract to carry certain wool from Cobourg to Boston within a reasonable time, subject to certain conditions endorsed on a receipt given by defendants—amongst others, that defendants should not be responsible for damages occasioned by delays from storms, accidents, or unavoidable causes—and alleging as a breach the neglect to carry. In the second count the contract was stated to be

to carry within a reasonable time, and so that the wool should be imported into the United States before the 17th of March, when the Reciprocity Treaty would expire.—*Breach*, that defendants did not so carry, by which the plaintiffs were disabled from importing the wool into the States unless upon payment of duties.

As to the first count, it appeared by the defendants' receipt, put in by the plaintiffs, that there was an additional condition, that as to goods addressed to consignees resident beyond the places where defendants had stations (as these goods were), defendants' responsibility should cease upon their giving notice to the carriers onward, that they were prepared to deliver the goods to them for further transport. *Held*, a substantial qualification of the contract declared on, which therefore was not proved as alleged.

As to the second count, the same receipt applied, which named no day for carriage into the United States, but there was verbal evidence of an agreement to forward by the 17th of March. *Held*, that though this term might thus be added to the written contract, it would not dispense with the condition above mentioned, which shewed a substantial variance from the contract declared on.

The plaintiffs therefore were held not entitled to recover on either count.

The witnesses called to prove the imposition of a duty in the United States after the 17th of March, derived their knowledge only from printed circulars. *Held*, insufficient.

The wool was sent as far as Prescott, where it was to cross the St. Lawrence, but not having been sent over to Ogdensburg by the 17th, the plaintiffs gave no further instructions, and it remained at Prescott. *Held*, that though if a special contract to deliver within the United States by the 17th had been proved, the duty, if paid by the plaintiffs, might have been recovered as damages, yet it was their duty to enter the goods and pay it, and they could not hold defendants responsible for delay occasioned by their default.—*Fraser et al. v. The Grand Trunk Railway Company*, 488.

RAPE.

See CRIMINAL LAW, 8.

REASONABLE AND PROBABLE CAUSE.

Evidence of.]—See MALICIOUS PROSECUTION, 2, 3.

RECTORS.

1. *Grant in trust to three—Power of two to convey—Conveyance by two to the third as Rector—Lease—Estoppel.*]—On the 19th January, 1824, the Crown granted to O. S., G. M., and J. M., in fee, certain land, which had formerly been set apart for a Rectory, and on which a church had been erected, in trust to confirm all existing leases, and to grant new leases, and apply the rent first to the payment of any money borrowed for erecting a new church, and then to pay the rent to the clergyman of such church; with a proviso for the appointment

of new trustees by the three grantees, or the survivors or survivor of them, and a further proviso, that whenever the Governor should erect a Parsonage or Rectory in Kingston, and duly present an incumbent thereto, the trustees should by instrument under their hands and seals, attested by two credible witnesses, convey the land to such incumbent and his successors forever, upon the same trusts therein before expressed.

On the 21st January, 1836, letters patent issued erecting a Rectory in Kingston.

Before the 10th May, 1837, the trusts of the patent of 1824 had been fulfilled, and on that day, by deed-poll, after reciting the two patents above mentioned, and the induction of the said O. S. into the said Rectory, the said G. M., and J. M., the two other grantees in the first patent mentioned, in fulfilment of the trust, conveyed the land to said O. S., as Rector and Incumbent, to hold to him and to his successors, subject to and under the uses and trusts set forth in the letters patent to them.

To this was appended another deed-poll of the same date, executed by O. S., and declaring for himself and his heirs that as one of the trustees named in the patent of 1824, he agreed to this assignment, and held the same in his capacity of Rector and Incumbent of Kingston, and not otherwise.

In 1842, O. S. leased the land for 21 years, with certain covenants for building and renewal. In this lease he was described as Rector, and it recited the two patents of 1824 and 1836. The successor of

O. S., brought ejectment against defendants, claiming under this lease.

Held, on the authority of *Denne dem. Bowyer v. Judge* (11 East 288) that the conveyance of 1837 passed two-thirds to the plaintiff, and that he was entitled to recover for that; for *semble*, in a Court of law the ground that the trust to convey, being joint, was incapable of severance, could not arise, the legal estate only being in question.

But for that decision, *Semble*, that if the appointment of O. S., as Rector rendered him *ipso facto* incapable of acting in the trusts of the patent of 1824, it could not divest him of the estate, or prevent him from joining in a conveyance to any new trustee substituted for him; nor could the deed poll of 1837, executed by him, pass the estate vested in him in trust in his natural capacity, to himself as a Rector and corporation sole; that whether the grantees in the patent were to be treated as taking a power, or as trustees owning the fee, the conveyance by two only of the three was inoperative; and, *semble*, that they were trustees.

The two-thirds having passed to O. S. as Rector by the conveyance, he still held the remaining third in his natural capacity, and the joint estate was thus severed, for as Rector he could not be joint tenant with a natural person.

The law of England in respect to the rights and powers of Rectors as to the land vested in them as such, is in force in this country; and in this case the provisions in the defendants' lease respecting renewal

were not binding on the plaintiff, as the successor of O. S., the lessor and first Rector.

Held, that defendants were not estopped by the lease from denying the power of O. S. to lease, for the recitals professed to shew what title he had.—*Lyster v. Kirkpatrick, et al*, 217.

REGISTRAR.

1. *Tenure of office.*—Defendant was appointed Registrar in 1859, under 9 Vic., c. 34, by which the Governor is authorized in general terms to appoint, and provision is made for removal on certain contingencies, to be proved in a specified manner. His commission conferred upon him the office, with all the rights, &c., thereto belonging, but expressed the appointment to be during pleasure. In 1864, he was removed, and defendant appointed, the admitted cause of such removal being alleged misconduct as returning officer at an election.

Held, that by the Statute the plaintiff was subject to removal only for the reasons and by the means there provided; that the words “during pleasure,” in his commission, could not deprive him of his statutory rights; that the 29 V. c. 24, passed after defendant’s appointment, by which every Registrar then in office was continued therein, would not confirm such appointment if illegal; and that the Interpretation Act, providing that a power to appoint shall include power to remove, could not apply.

The plaintiff therefore was held to be still Registrar, and entitled to the fees of such office received

by defendant.—*Hammond v. Mc-Lay*, 434.

2. *Services under 29 Vic. ch. 24, secs. 26, 33*—Action for—*Joint liability of Counties after separation—Pleading.*—Under the provisions of the Registry and Municipal Acts, 29 Vic. ch. 24, and 29–30 Vic., ch. 51—*Held*, that the Counties of York and Peel were jointly liable to the Registrar of Peel for services rendered by him, under secs. 26 and 33 of the Registry Act, before the separation of these counties,

Held, also, that the provision in sec. 70, of the Registry Act, authorising the Inspector to certify the amount, rendered the general averment in the declaration of services rendered sufficient.—*Campbell v. Corporation of York and Peel*, 635.

REGISTRY LAWS.

1. *Discharge of Mortgage—Defective affidavit—C. S. U. C. ch. 89, sec. 59.*—The Registrar having recorded a certificate of discharge, upon an affidavit which did not state the place of execution, as required by the Statute—*Held*, that though he should properly have refused to register it, yet being registered, it was effectual as a reconveyance of the legal estate to the mortgagor.

Robson v. Waddell, 24 U. C. R. 574, distinguished, on the ground that there the defect was patent on the face of the Registry Book where the memorial was copied.—*Magrath v. Todd*, 87.

2. *Leases—Consol. Stat. U. C. ch. 89, sec. 45.*—In ejectment the plaintiff claimed through a mort-

gage from B., dated 31st May, and registered 3rd June, 1864, Defendant had held a lease from B. for five years from the 18th April, 1861, and while it was current, before the execution of the mortgage, he obtained another lease for four years from the 18th April, 1866. Neither lease was registered, but defendant, who had continued in possession, claimed to hold it under the latter, as being a lease for less than twenty-one years "where the actual possession goeth along with the lease," and therefore not requiring registry under Consol. Stat. U. C. ch. 89, sec. 45.

Held, however, that the exception in that clause extends only to unregistered leases, under which the tenants had actual possession at the execution of the conveyance which, being registered, would prevail but for such exception; and that, as the defendant was then in possession under the first lease only, the second, being unregistered, had lost its priority.—*Davidson v. McKay*, 306.

3. *Form of certificate*—29 Vic. ch. 24, sec. 53.]—A Registrar endorsed on a mortgage sent to him for registry as follows: "No. 44322, purporting to be a duplicate hereof, was recorded" at, &c., on, &c.

Held, clearly not a compliance with the Statute, 29 Vic. ch. 24, sec. 53, under which the Registrar must examine the instruments and certify without qualification the facts which he is required to state.—*In re Bradshaw and the Registrar of the County of Simcoe*, 464.

4. *Registry Acts*—9 V. ch. 12, 10 & 11 V. ch. 38.]—L. conveyed to D., in 1832, and D. to C., in

1833. Plaintiff was C.'s heir. These deeds were registered in 1833, but not in accordance with the Acts. D.'s heir, in 1857, conveyed to K., who had notice of the previous deeds, and through whom defendant claimed. K. registered his deed in 1857; and in 1866, the plaintiff had his two deeds "examined and re-entered" under the 9 Vic. ch. 12, 10 & 11 Vic. ch. 38, passed to remedy the errors in previous registries.

Held, that the plaintiff's title clearly must prevail, for under the then Registry Acts, as the title first became a registered one in 1857, K. gained nothing by his prior registration, and if he had, his interest so acquired would not be protected by the remedial acts.—*Campbell et al. v. Fox*, 631.

See WILL, 2.

RELEASE.

Deed—Construction—14 & 15 Vic. ch. 7, sec. 2.]—A. died in possession intestate in July, 1851, leaving his widow, and the plaintiff his eldest son. The plaintiff, on the 15th October, 1851, by deed poll, in consideration of £50, "remised, released, and for ever quit-claimed" the land, in fee simple, to his mother, who was still living on the place. Defendants claimed under her.

Held, that the deed could take effect as a release only; that the widow, being a tenant at sufferance, had no estate upon which it could operate; and that it therefore passed nothing.

Held, also, that the 14 & 15 Vic. ch. 7, sec. 2, enacting that all cor-

poreal tenements and hereditaments shall be deemed to lie in grant as well as in livery, could not help; for it was not intended to alter the construction of the language of deeds, but to enable terms which would only have passed incorporeal to pass corporeal hereditaments.

Hagarty, J., dissenting, on the ground that whatever words would amount to a grant of an incorporeal hereditament before the Statute, would, by virtue of it, operate on corporeal hereditaments; and *quære* whether the estate of the widow was not sufficient for the deed to take effect as a release.—*Acre v. Livingstone, et al.*, 282.

REPLEVIN.

1. *Action on replevin bond—Plea, return of the goods.*—Declaration on a replevin bond, by the Sheriff's assignee, alleging that B., the plaintiff in replevin, did not prosecute his suit with effect, and did not make a return of the goods, though such return was adjudged, and a reasonable time for making it had elapsed. Plea, that B. did make a return according to the condition, but that the plaintiff refused to accept the same.

Held, a bad plea, as answering only one breach, and therefore no bar to the plaintiff's recovery. *Golding v. Bellnap et al.*, 163.

2. *Evidence of taking—Damages.*—Replevin will lie in this country, though there has been no wrongful taking, but a detention only is complained of, and this though the writ and declaration charges both, for every detention is a new taking.

The title of an administrator relates back to the death of the intestate, so as to enable him to replevy goods taken before the grant of administration.

In this case the defendants were the widow of the intestate and her second husband. It was shewn that she had taken possession of and appropriated to her own use the intestate's property, and acts and declarations of both defendants established that they held it together after her second marriage. *Held*, sufficient evidence of a joint taking.

Held, also, that the plaintiff might recover as damages the value of any of the property in the defendants' hands at the time of issuing the writ, though not actually replevied.

Seem, if it had been shewn that the widow had paid funeral expenses or debts of the intestate, this might have been allowed in mitigation of damages. *Deal, Administrator v. Potter et ux*, 578.

See CERTIORARI.

REPORTER.

See CRIMINAL LAW, 4.

RULES OF COURT

As to Paper Days and New Trial Paper in Easter and Michaelmas Terms, and as to setting down County Court appeals.—421.

RULES AND ORDERS.

Practice on, as regards affidavits.—See AFFIDAVIT, 1.

See PRACTICE—PRACTICE COURT—PROHIBITION.

SALE OF LAND.

Default by vendee—Right to re-

cover back deposit.]—H., a lessee of certain land, assigned to the defendant, who agreed to sell to the plaintiff for \$449, and received \$100 on account. The plaintiff having made default in his other payments, the defendants sold to one C., for \$349, stipulating with him that he should give the plaintiff a chance of redeeming the place for the same sum, which C. said the plaintiff agreed, but failed to do.

Held, following *Campbell v. Grier*, 10 C. P. 295, that the plaintiff could not recover back the \$100 on the common counts, for the agreement having been abandoned through his inability to fulfil it, there could be no implied promise on defendant's part to refund the deposit.—*Delong v. Oliver*, 612.

For taxes.]—See TAXES.

SCHOOLS.

Union of Grammar and Common Schools—C. S. U. C. ch. 63, sec. 25, sub-sec. 7—Ch. 64, sec. 79, sub-sec. 9.]—"The United Board of Grammar and Common School Trustees of the Village of Trenton," applied for a mandamus to the Corporation of Trenton, to levy a sum of money required by them for Grammar School purposes, as mentioned in the estimate; supporting the application by an affidavit of their Secretary, who stated that the Trustees of the Village of Trenton County Grammar School had united with the Board of School Trustees of the Village of Trenton, and the same became and had ever since been the United Board of Grammar and Common School Trustees of the village.

Held, that such union of the two Boards of Trustees was not authorised by the Statutes—Consol. Stat. U. C., ch. 63, sec. 25, sub-sec. 7, and ch. 64, sec. 79, sub-sec. 9; and the application was therefore refused.—*School Trustees of Trenton and the Corporation of Trenton*, 353.

SEAL

Omission of, to warrant for sale of land for taxes.]—See TAXES, 4.

SECOND ACTION.

See STAYING PROCEEDINGS.

SECOND APPLICATION.

See PRACTICE, 1.

SESSIONS.

See QUARTER SESSIONS.

SET-OFF.

Declaration against the executrix of F., a Division Court Clerk, on the covenant entered into by him and his sureties, for non-payment of money collected by him.

Plea, on equitable grounds, set-off for money due to the defendant as executrix, on a judgment recovered by her as such executrix against the plaintiff, for goods sold, money lent, &c., by the testator to the plaintiff.

Held, a good defence.—*Moffatt v Foley, Executrix*, 509.

SHERIFF.

1. *Executions — New Sheriff—Sale under Ven. Ex. to his predecessor.*—On the 16th December, 1858, the defendant issued a *fi. fa.* to the then Sheriff of Lincoln, K., to which he returned goods on hand for want of buyers, having taken a bond from the execution debtor to produce them, and on the 26th of April, 1860, a *ven. ex.* was delivered to him. On the 28th April, 1862, a new Sheriff was appointed, who took possession of all the writs found in K.'s hands, but K. made no transfer to him by indenture of the writs or bond, nor did he deliver over to him the goods. In December, 1865, the new Sheriff sold under the *Ven. Ex.*, having previously received an attachment at the plaintiff's suit.

Held, that the sale could not be upheld, and that the attachment therefore must prevail.—*Riley v. the Niagara District Bank*, 21.

2. *False Return—Prior writ not acted upon—Sheriff estopped from setting it up.*—In an action against the Sheriff for a false return, it appeared that on the day before the plaintiff's writ came in he received a *fi. fa.* at the suit of one K. for more than the value of the debtor's goods, and gave a warrant to his bailiff, who only went to the debtor's shop and told him of it, because he thought more could be got by allowing him to go on with his business. On the plaintiff's writ he did nothing. The plaintiff's attorney wrote twice, urging him to act, and ruled him, and in February, 1866, he returned that writ *nulla bona*, K.'s writ having been previously renewed. The Court being left to draw inferences of fact—

Held, that, as a matter of fact, the Sheriff never seized, or that, as a matter of law, he abandoned it; and that though his acts might not affect K. in an action between K. and the plaintiffs, yet they prevented him from setting up the first writ as a justification for his return to the second. The plaintiffs were therefore held entitled to recover.—*Foster et al. v. Glass (Sheriff)*, 277.

3. *Recovery for false return—Subsequent action on covenant.*—Where the plaintiff had recovered judgment against a Sheriff for falsely returning *nulla bona* to a *fi. fa.* on which he had made the money. *Held*, following *Sloan v. Creasor*, 22 U. C. R. 127, that he could not afterwards sue the Sheriff and his sureties, on their covenant, for not paying over such money,—*Miller v. Corbett, et al.*, 478.

Right of Sheriff of York to summon Juries for City of Toronto.—See YORK AND PEEL, UNITED COUNTIES OF, 2.

Sale of Stock by, mandamus to transfer.—See STOCK.

SLANDER.

See DEFAMATION.

STATUTES, (CONSTRUCTION OF.)

Relating to evidence and procedure, treated as retrospective.—See DISTILLERS.

See SURVEY, 2 — USURY.

25 Geo. II. ch. 6.—See Will 2.
 3 Vic. ch. 46.—See Taxes 5.
 9 Vic. ch. 34.—See Registrar.
 14 & 15 Vic. ch. 7, sec. 2.—See Release.
 Consol. Stat. C. ch. 70.—See Stock.
 Consol. Stat. C. ch. 92, sec. 71.—See Criminal Law, 1.
 Consol. Stat. U. C. ch. 15, sec. 68.—See County Court, 2.
 Consol. Stat. U. C. ch. 22 (C.L.P.A.), secs. 316, 324, 328.—See Costs, 2.
 Consol. Stat. U. C. ch. 25.—See Absconding Debtors.
 Consol. Stat. U.C. ch. 27.—See Ejectment.
 Consol. Stat. U. C. ch. 29.—See Replevin.
 Consol. Stat. U. C. ch. 32.—See Commission to Examine Witnesses.
 Consol. Stat. U.C. ch. 44, secs. 3, 4.—See Limitations (Statute of), 2.
 Consol. Stat. U.C. ch. 54, sec. 294.—See Municipal Corporations, 3.
 Consol. Stat. U.C. ch. 54, sec. 313.—See Highway, 3.
 Consol. Stat. U.C. ch. 54, sec. 336.—See Highway, 1.
 Consol Stat. U.C. ch. 55.—See Taxes.
 Consol. Stat. U. C. chs. 63 & 64.—See Schools.
 Consol. Stat. U. C. ch. 77.—See Illegitimate Child.
 Consol. Stat. U. C. ch. 82, sec. 13.—See Wills, 2.
 Consol. Stat. U. C. ch. 88, sec. 3.—See Limitations (Statute of), 1.
 Consol. Stat. U. C. ch. 89.—See Registry Laws.
 Consol. Stat. U. C. ch. 93, sec. 6.—See Survey, 1.
 Consol. Stat. U. C. ch. 93, sec. 28.—See Survey, 2.
 Consol. Stat. U. C. ch. 93, sec. 53.—See Insurance, 2.
 Consol. Stat. U. C. ch. 98.—See Criminal Law, 3, 4, 5, 9.
 Consol. Stat. U. C. ch. 112.—See Quarter Sessions.
 Consol. Stat. U. C. ch. 114.—See Appeal.
 23 Vic. ch. 44.—See Certiorari.
 25 Vic. ch. 23.—See License to Sell Liquors, 1.
 27-28 Vic. ch. 3.—See Distillers.
 27-28 Vic. ch. 19, sec. 9.—See Criminal Law, 2.

29 Vic. ch. 3.—See Distillers.
 29 Vic. ch. 24.—See Registrar—Registry Laws, 2.
 29-30 Vic. ch. 51, secs. 249, 254.—See Licenses to Sell Liquors, 2.
 29-30 Vic. ch. 51, sec. 124.—See Municipal Corporations, 4.
 29-30 Vic. ch. 10, sec. 5.—See Usury.

STAYING PROCEEDINGS.

Action in C. C.—Second action in Q. B.—Discontinuance — Staying proceedings.]—The plaintiff, having sued in the County Court, proved a claim beyond the jurisdiction, whereupon the jury were discharged. He then brought his action in this Court, and upon defendant's application an order was made staying proceedings until the plaintiff should discontinue the County Court action and pay the costs of it.

The order was rescinded, for, 1. The County Court having no jurisdiction the plaintiff could not discontinue the suit there, which would be a proceeding in the cause; and, 2. This suit being for a debt, and not brought oppressively or vexatiously, should not have been stayed.—*Hodgson v. Graham*, 127.

STOCK.

Sheriff's sale of stock—Mandamus to transfer—Demand and refusal—C. S. C. ch. 70.]—On application for a mandamus to a road company to transfer stock to a purchaser thereof under execution—*Held*, that a demand and refusal after service of the attested copy of execution, was essential, under C. S. C. ch. 70; and for want of it the rule was discharged with costs.

The execution debtor was the president of the company, and on shewing cause affidavits made by him were filed, asserting payment of the execution before the sale, &c. *Held*, that this could not justify the company in refusing to transfer, for they had no concern with the transactions between the execution plaintiff and defendant, or between the defendant and the Sheriff.

Quære, as to the effect of a delay in serving the attested copy beyond the ten days after the sale, prescribed by the Act.—*In the matter of Guillot and the Sandwich and Windsor Gravel Road Company*, 246.

SURVEY.

1. *C. S. U. C. ch. 93—Re-survey of township.*—The County Council, under Consol. Stat. U. C. ch. 93, sec. 6, having caused the re-survey of an entire township, and directed a certain sum to be levied for the expenses, by a by-law which had been quashed, by a subsequent by-law directed the collection of a further sum for the purpose, to be levied on the proprietors of land in the township in proportion to the quantity of land held by them respectively in such township. This by-law was quashed, on the grounds, 1. That the Statute does not authorize the re-survey of a whole township. 2. That it directs the expense of each concession to be borne by the proprietors of land there.—*In the matter of Scott and the Corporation of the County of Peterborough*, 36.

2. *C. S. U. C. ch. 93, sec. 28—Double-front concessions.*—The 12

Vic. ch. 35 sec. 37 (Consol. Stat. U. C. ch. 93, sec. 28) which prescribes the rule for drawing the side-lines in double-fronted concessions, applies to townships theretofore surveyed.

Held, following *Warnock v. Cowan*, 13 U. C. R. 257, and *Holmes v. McKechin*, 23 U. C. R., 52, 321—that the lands having been described in half lots is made by that section part of the definition of a township with double front concessions.

Held, also, that the rule prescribed applies to all lands in such concessions, not to the grants of half lots only, and that it is brought into application by the granting of any half lots.

Semble, however, that the section is on both points open to doubts, which it is desirable to remove by Legislation.—*Marrs v. Davidson*, 641.

See MUNICIPAL CORPORATIONS, 1, 2.

Discrepancy between work on the ground and plan—Highway.—See HIGHWAY, 3.

See BOUNDARY LINE COMMISSIONERS—DESCRIPTION OF LAND—MUNICIPAL CORPORATIONS, 1, 2.

TAXES.

1. *City property—Appeal—C. S. U. C. ch. 55, sec. 2, sub-sec. 7.*—*Held*, that property owned by a city but leased by them to an occupant for his own private purposes, is liable to taxation—*Morrison, J.*, dissenting.

Held, also, following the latest decision of this Court, *The Great Western R. W. Co. v. City of Teronto*, 25 U. C. R. 570, that a person assessed for property exempt from taxation, who has appealed to the Court of Revision (but not to the County Court Judge), is bound by their decision.—*Scragg v. The Corporation of the City of London*, 263.

2. *Sale of land—Redemption of part—C. S. U. C., ch. 55, sec. 113.*]—An entire lot having been sold, one C. paid the redemption money on the east half, and one P. on the west half, but it was afterwards represented to the Council that P.'s payment had been made by mistake, and the Treasurer being ordered to refund, applied the money by P.'s authority to another lot.

Held, that under Consol. Stat. U. C. ch. 55, sec. 113, the owner of part of a whole lot sold for taxes might redeem such part on paying the proportionate amount chargeable against it; and that the clause did not merely allow such payment before sale. The east half was therefore held to have been properly redeemed; but

Quære, if redemption of the whole had been necessary, as to the effect of P.'s payment by mistake.—*Payne v. Goodyear et al.*, 448.

3. 6 Geo. IV., ch. 7—*Sale by Sheriff out of office.*]—In ejectment the defendant claimed through a sale for taxes made under 6 Geo. IV. ch. 7. The warrant relied upon issued in 1837 to the then Sheriff, M., who ceased to hold office in 1838; the return stated the sale to have been made in 1840; and M. executed the deed in 1841.

Held, clearly insufficient, for the sale and deed being made by a person out of office were *prima facie* unauthorized, and defendant gave no proof of any proceedings taken by M. which could be regarded as an inception of execution.

If there had been such proof, *Quære*, whether the law as to inception of execution or process applies equally to tax sales and to sales of land on judgments.—*McMillan v. McDonald*, 454.

4. *Warrant not sealed.*]—Land having been sold for taxes under a warrant issued without a seal. *Held*, that the sale was invalid, and the defect not cured by 29 Vic. ch. 26.—*Morgan v. Quesnel*, 539.

5. *Payment to wrong officer—3 Vic. ch. 46.*]—*Quære*, as to the effect of 3 Vic. ch. 46, and of the payment of taxes made by the defendant to the wrong officer, as stated in the case.—*Cushing v. McDonald*, 605.

6. *Taxes—Money paid—Right to recover back.*]—Certain lands were sold by the Crown to B., in 1853, which sale was cancelled in 1866, and the same lands sold to the plaintiff, to whom the patent issued. The land, it was admitted, had been legally assessed for certain taxes for 1863, 4, and 5. The plaintiff, on application to the County Treasurer, ascertained the amount due and paid it, stating that he did so under protest and without prejudice to his rights; but no demand had been made, nor any pressure exercised or threatened to compel such payment.

Held, that the money so paid could not be recovered back.—*Ben-*

jamin v. The Corporation of the County of Elgin, 660.

summon jurors for.]—See YORK AND PEEL, UNITED COUNTIES OF, 2.

TENANTS IN COMMON.

See EJECTMENT, 2—WILL, 3—PARTNERSHIP, 2.

THEFT.

Action for money advanced—Plea, money stolen from defendant—Refusal by Court to determine facts.]—Plaintiff sued for money advanced by him to defendants to purchase wheat for him, alleging that they had not purchased or accounted. Defendants pleaded, in substance, that the money, while kept unmixed with their own as the plaintiff's money, was stolen from them by persons unknown, without any neglect on their part. At the trial a verdict was taken for plaintiff, subject to the opinion of the Court whether the defendants were liable, with power to draw inferences of fact. The Court declined to assume the functions of a jury in determining, upon evidence wholly circumstantial, whether the money had been stolen, and directed a new trial, with costs to abide the event.

Remarks as to such defence, and the facts required to sustain it.—*Bickle v. Mathewson et al.*, 137.

TITLE.

See INSURANCE, 4.

TORONTO (CITY OF)

Right of Sheriff of Toronto to

TORTS.

Liability of principal for torts by agent.] — See PRINCIPAL AND AGENT.

TRESPASS.

1. *Right to maintain.*]—Plaintiff and defendant were working together boring an oil well. Plaintiff was at the bottom, and defendant's brother had been at the top directing the ram used to drive down the pipe. He asked defendant to attend to it while he went away for a short time, and defendant, not knowing that plaintiff was below, let down the ram and injured the plaintiff's hand.

Held, that trespass would lie, defendant's intention being immaterial; and a non-suit was set aside.—*Anderson v. Stiver*, 526.

2. *Leave and license.*]—The declaration charged the trespasses, breaking down fences, &c., as committed on divers days and times. Defendant pleaded leave and license, which the plaintiff traversed. It appeared that part of the fence was removed under a license, and the remainder after it had been revoked, the interval from the first to the last removal being two or three years.

Held, that the plaintiff was entitled to succeed, though it would have been otherwise if the declaration had only charged the trespasses as committed on the same day, for the defendant could then have applied the license to the only tres-

pass charged.—*Marrs v. Davidson*, 641.

Several defendants—Separate damages.—See DAMAGES 1.

TROVER.

1. *Evidence of Conversion.*—The plaintiff sent to his agent, J., two boxes of trees and roots, made up in bundles addressed to various purchasers. They went by steamer to defendant, a forwarder at Powell's Landing, where they arrived on Saturday, 5th May, and were taken from the boxes by defendant, and some of them delivered to the persons to whom they were addressed, who called for them. On Wednesday a person was sent by J. to take and deliver them, and on Thursday J. himself called. Many of the trees were injured, and the evidence was contradictory as to the state in which they arrived, and as to whether this injury was caused by defendant's treatment of them, or whether it was necessary, as he alleged, to open the boxes and deliver them without delay. The plaintiff having brought trover—

Held, that whether defendant had been guilty of negligence as a bailee or not, he had done nothing which would in law amount to a conversion; and a verdict for defendant having been set aside in the County Court, the judgment was reversed.—*Lovekin v. Podger*, 156.

Conversion by Agent of Bank—Liability of Bank.—See PRINCIPAL AND AGENT.

See PARTNERSHIP, 2.

TRUSTS.

See RECTORS.

UNCERTAINTY.

In statement of misrepresentation sued for.—See ACTION, 3.

USURY.

Banks—Usury—29-30 Vic. ch. 10, sec. 5.—*Held*, Morrison, J., dissenting, that the 29-30 Vic. ch. 10, sec. 5, has not a retrospective operation, so as to enable a Bank to recover upon usurious notes given before it was passed.

VARIANCE

Between statement and evidence of contract to carry.—See R. W. COMPANIES.

VENUE.

C. S. U. C. ch. 54, sec. 38.—A venue of the "United Counties of Huron and Bruce, to wit." *Held*, bad on demurrer.

See CRIMINAL LAW, 6.

WAIVER.

Of objections to evidence under commission.—See COMMISSION TO EXAMINE WITNESSES.

Of Judge's order, allowing landlord to defend in ejectment.—See EJECTMENT 1.

Of Judge's order, by delay in taking it out.—See PRACTICE, 2.

WARRANT.

For sale of land for taxes—Omission of seal to.]—See TAXES, 4.

WATER COURSE.

Action for obstructing—Injury to plaintiff's right—Right to recover, though no damage proved.]—See ACTION, 2.

WILL.

1. *Construction — Annuities.]—*One W. devised his farm to his wife, to hold so long as she remained his widow, provided that she pay to his mother \$20 a year during her life, and to his brother William the same; and in the event of the marriage or death of his wife, he willed that the property should be sold, and the proceeds divided between the children of his brothers and sister.

Held, that the will created no charge upon the land, and that the annuitants had no power to distrain. — *Clifton v. Ryan and Whitt*, 9.

2. *Devise to attesting witness—Memorial signed by him—Proof of attestation—25 Geo. II. ch. 6—Statute of Frauds—C. S. U. C. ch. 82, sec. 13—"Credible Witness."]*—In ejectment the plaintiff claimed under the heir-at-law of J. D., defendant under J. D.'s will, by which the land in question was devised to defendant, with a devise over to another son if he died before 25, and similar devises over if that and other devisees named died before that age, his son John being the last named;

but whoever got the property was to pay each of his children £5.—There were the names of three attesting witnesses, John, and M., who had married one of the testator's daughters, being two of them; and the will was registered on a memorial signed by John as one of the devisees. The Jury, however, found that John was not in fact an attesting witness.

Held, that this finding was wrong, upon the evidence set out in the cause; and that it should have been shewn whether testator's title was registered, for otherwise registration of the will, under C. S. U. C. ch. 89, would be unnecessary. A new trial was therefore ordered.

If John was an attesting witness, then, under 25 Geo. II. ch. 6, the devise to him was void, and the registry on a memorial signed by him as devisee was ineffectual.

If he was not, then of the two remaining witnesses M. was disqualified, for the devise to his wife of a legacy was not avoided by 25 Geo. II., and it made him not a *credible* witness within the Statute of Frauds.

Consol. Stat. U. C. ch. 82, sec. 13, which allows wills to be attested by two instead of three witnesses, changes the number only, not the character; they must still be "credible" witnesses.

Semble, therefore, in either case, if the will required registration the plaintiff would be entitled to recover.—*Ryan v. Devereux*, 100.

3. *Construction — Tenancy in common.]—*H. P., who died in 1833, desired by his will that his sons and daughters should meet to

have an inventory taken of all his goods and lands, and if any of them had received any goods they should give them in to be appraised, and keep them as part of their shares, and if any of them were living on his lands they should keep the same at the inventory price; and at a subsequent meeting they should agree together for the division of "my said goods and chattels, lands and tenements, by me given and bequeathed to them, their heirs, and each of their heirs and assigns forever, to share and share alike." He left seven children, one of whom, a married daughter, was living on the land in question with her husband at the testator's death, and had been so for many years previous. The plaintiff, claiming through another daughter, contended that the will made all testator's children tenants in common of all his land, and that he was entitled to a one-seventh part of this; but

Held, that even if the will created a tenancy in common as to all other lands, it did not extend to lands on which any of the children were living.—*Moross v. McAllister*, 368.

3. *Construction—Estate.*]—F. who died in 1861, by his will, made in that year, gave to his wife all his lands for life; and after her decease he devised to each of his seven children separate lands, adding "and in case any of the aforesaid legatees should die before he or she comes of age, or should die intestate, then and in such case his or her portion shall be equally divided among the remaining survivors." J. F., the eldest son, and one of the devisees, died intestate in 1867, at the age of thirty, leaving a son, the

testator's widow having died in 1864.

Held, that J. F., being twenty-one at his father's death, took an absolute vested interest in fee in remainder expectant on his mother's death; that the devise over was void as being repugnant to this gift preceding it; and that the land devised to J. F. went therefore to his son, not among the other surviving devisees.

Semble, that if necessary or in the devise over might have been read *and*.—*Farrell v. Farrell*, 652.

WITNESSES.

See COMMISSION TO EXAMINE WITNESSES.—EVIDENCE.—WILL, 2.

WORDS.

Valuable Security.]—*See* CRIMINAL LAW, 1.

"*Laying Out.*"]—*See* HIGHWAY, 1.

"*Resident.*"]—*See* R.W. Cos., 1.

"*Credible Witness.*"]—*See* WILL, 2.

YORK AND PEEL (UNITED COUNTIES OF).

1. *Separation—Jury.*]—By proclamation published on the 15th December, 1866, the County of Peel was separated from York from and after the first of January, 1867. On the 23rd November preceding, the usual precept had been sent to the Sheriff of the United Counties for the Winter Assizes for York, to

be held on the 10th January, 1867, and the Sheriff returned his panel to that precept, containing 54 jurors from York and 30 from Peel. Only those from York however attended, and the prisoner was tried by a jury *de medietate*, including six of these jurors, upon an indictment found and pleaded to at the previous Assizes in October. On motion for a new trial, or *venire de novo*, because the precept and panel should have been for York only, not for the United Counties,

Held, per *Draper*, C. J., that the objection, if available at all, must be taken by writ of error.

Per *Hagarty*, J., no objection

would lie.—*Regina v. Kennedy*, 326.

2. *County of the City of Toronto—Right of Sheriff to select and summon Jurors—24 Vic. ch. 53.*—*Held*, that since the Act separating the City of Toronto from the United Counties of York and Peel, 24 Vic. ch. 53, the Sheriff of the County of the City of Toronto, not the High Bailiff, is entitled to be selector of, and to ballot for, and summon, the jurors for Courts held in the City. *Morrison*, J., doubting as to the first point.—*In re the Sheriff of the City of Toronto and the Recorder of the City of Toronto*. 346.

See REGISTRAR 2.

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